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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928 9

No. 766 50

T. L. CARPENTER AND LILLIE V. CARPENTER, PETITIONERS,

vs.

A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR CERTIORARI FILED MARCH 13, 1929

CERTIORARI GRANTED APRIL 15, 1929

(34,075)

( )

SUPREME COURT OF THE UNITED STATES

---------- TERM

No.----------

T. L. CARPENTER AND LILLIE V. CARPENTER,
Petitioners,

vs.

A. S. J. SHAW, *State Auditor of the State of Oklahoma*,
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

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IN SUPREME COURT OF OKLAHOMA

Case Made from District Court of Oklahoma County—Filed February 2, 1928

[File Endorsements Omitted.]

IN DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

No. 52682

T. L. CARPENTER AND LILLIE V. CARPENTER,
Plaintiffs

vs.

A. S. J. SHAW, State Auditor of the State of Oklahoma,
Defendant

AMENDED PETITION.

Now come the plaintiffs, T. L. Carpenter and Lillie V. Carpenter, husband and wife, complaining of the defendant, A. S. J. Shaw as State Auditor of the State of Oklahoma, and represent and show to the court that said defendant, A. S. J. Shaw, is the duly elected, qualified and acting State Auditor of the State of Oklahoma, and this action is being maintained and prosecuted against him in his official capacity as State Auditor of the State of Oklahoma.

For cause of action against said defendant, plaintiffs respectfully represent and show to this honorable court:

FIRST CAUSE OF ACTION.

(1) That the plaintiffs, T. L. Carpenter and Lillie V. Carpenter, are Choctaw Indians, duly enrolled as such opposite roll numbers 1493 and 408, respectively, of the approved rolls of the Choctaw Nation or Tribe of Indians; the said T. L. Carpenter being enrolled as a Choctaw by intermarriage and the said Lillie V. Carpenter being en-

rolled as of one-sixteenth Choctaw blood. That by virtue of their citizenship in said nation or tribe of Indians, the plaintiff T. L. Carpenter received as a portion of his allotment of the allotable lands of the Chickasaw and Choctaw Nations or Tribes of Indians the following described lands and tenements situated in Carter County, State of Oklahoma, to-wit:

The Southwest Quarter of Section 22, Twp. 2 South, R. 3 West, for which patent was issued to him on February 27th, 1907; and that there was allotted to the plaintiff Lillie V. Carpenter, as a portion of her allotment of the allotable lands of the Chickasaw and Choctaw nations or tribes of Indians, the following described lands and tenements situated in Carter County, State of Oklahoma, to-wit: The North half of the Northeast of Sec. 22, Twp. 2 South, R. 1 West, for which patent was issued to her on October 10th, 1906. That by virtue of the allotment of said lands to these plaintiffs as aforesaid, they thereupon and thereby became, have ever since been and now are vested with an indefeasible, fee simple title to said lands, respectively, in accordance with the existing treaties between the said nations or tribes of Indians and the United States Government and the various acts of Congress in relation to the lands of said Indians and the allotment thereof in severalty between the various members and citizens of said nations or tribes of Indians; and that plaintiffs have never parted with their title to said lands, respectively, or any interest therein, other than as hereinafter set forth.

(2) Plaintiffs further allege and state that subsequent to the allotment of said lands to these plaintiffs, respectively, as aforesaid, these plaintiffs leased said lands to one Wirt Franklin of Ardmore, Oklahoma, the Lone Star Gas Company, a corporation of Dallas, Texas, and the Humble Oil and Refining Company of Houston, Texas, for oil and gas purposes, and reserving unto themselves as the owners of said lands, respectively, a one-eighth royalty of all oil and gas which should be produced and saved therefrom by said lessees. That subsequent thereto, said lessees have by

exploration and development operations produced and are now producing oil and gas in paying quantities from said described lands under the terms of said leases, and have been during the time hereinafter referred to and are now paying to these plaintiffs large sums of money as royalties in accordance with the terms and provisions of said leases.

(3) That in the process of operating said leases and producing oil and gas therefrom by the lessees, the one-eighth portion of said minerals belonging to plaintiffs as royalties under the term of said leases, are pumped immediately as the same are extracted from the earth, into the pipe lines and containers of the purchaser of such minerals, where the same are passed through meters to determine the amount of such royalty interest and the amount due these plaintiffs therefor; and that the production and sale of such minerals in effect constitute one transaction; and in truth and in fact, the said Humble Oil and Refining Company purchases and takes the entire royalty interest in said minerals accruing to plaintiffs under the terms of its said lease at the mouth of the wells from which the same are produced, and plaintiffs do not in fact receive any portion of said minerals, but the value thereof in money instead.

(4) Plaintiffs further respectfully represent and show to the court that the defendant herein is demanding of these plaintiffs at quarterly periods ending March 31st, June 30th, September 30th and December 31st, respectively, the payment of a tax upon said royalty oil and gas and the royalty interest in said lands, commonly known as a gross production tax, equal to three percentum of the gross amount received by these plaintiffs during each such quarter from the sale of the one-eighth royalty oil and gas reserved and accruing to these plaintiffs from said lands under the terms and provisions of said leases. That during the year ending December 31st, 1926, these plaintiffs received the sum of $16,333.00 from the sale of royalty oil and gas produced during the said period from said lands and during the quarter ending March 31st, 1927, these plaintiffs received the sum of $4,000.00 from the amount of royalty

oil and gas produced from said lands during said period by the above named lessees under the terms and provisions of said leases; and that thereafter, and on or about the 30th day of April, 1927, these plaintiffs, in compliance with the demand of the defendant for the payment thereof, paid to the said defendant the sum of $490.00, being the equivalent of three per centum of the gross amount received by these plaintiffs from the sale of said oil and gas during the year ending December 31st, 1926, and also paid to the defendant the sum of $120.00, being the equivalent of three per centum of the gross amount received by these plaintiffs from the sale of said royalty oil and gas during the quarter ending March 31st, 1927, which sums were demanded by the defendant, and were paid by these plaintiffs as a tax, commonly known as a gross production tax, upon the proceeds of the sale of said royalty oil and gas and upon the royalty interest of such minerals in the lands above described, from which the same were produced.

(5) Plaintiffs further show to the court that the payment of said tax by these plaintiffs as aforesaid, was made under duress and protest, and that at the time of the payment thereof these plaintiffs served written notices of protest upon the defendants herein, setting forth the grounds of objection to said taxes and the reasons of the invalidity and illegality of the said taxes so demanded by the defendant, all in the manner and form as required by law, as shown by true copies of said notices of protest which are attached hereto marked Exhibit "A" and "B", respectively, and made part of this petition. That payment of said taxes was necessary to prevent the issuance of the defendant's warrant for the collection of the same, and to prevent the stopping by the defendant of further payments accruing to these plaintiffs for the sale of said royalty oil and gas, and to prevent the accumulation of penalties thereon.

(6) Now these plaintiffs further allege and state that by virtue of the various treaty provisions existing between the Choctaw and Chickasaw nations or tribes of Indians and the United States Government, and the acts of Con-

gress in relation to the lands of said nations or tribes of Indians, and the allotment thereof in severalty between the various members or citizens of said nations or tribes of Indians, and particularly the provisions of Act of Congress of June 28th, 1898, (30 Statute at Large 505, Chap 517), and the provisions of the Constitution and laws of the State of Oklahoma, said lands and the issues, rents, revenues, royalties and proceeds arising therefrom, including said royalty oil and gas, are exempt to these plaintiffs and are not subject to taxation in any manner or form for any purpose, in the hands of the plaintiffs, the allottees of said lands, respectively, for a period of twenty-one years from date of the issuance of patents to said lands to these plaintiffs, respectively, which period has not yet expired; by reason of which, plaintiffs say that said taxes were exacted of them without authority of law and that said gross production taxes so paid by these plaintiffs to the defendant herein, as aforesaid, are and were excessive, illegal and void, to the full extent thereof, and these plaintiffs are therefore entitled to recover the same from the defendant herein.

(7) Plaintiffs further say that should it be contended and should the court be of the opinion and find that such tax as to the plaintiffs, is not a tax levied or assessed either directly or indirectly upon said lands, nor upon the rents, royalties, revenues, proceeds and income arising therefrom; and that it should be further contended that such royalty oil and gas, when severed from the soil, immediately becomes personal property, wholly separate, disconnected and distinct from said lands from which the same are and were produced, and that such royalty minerals immediately became taxable, and that such gross production tax is and was levied as to these plaintiffs and other Indian allottees similarly situated, against said royalty minerals as personal property after severance and wholly separate and distinct from said lands and all interest therein from which such minerals are and were produced, and the court should conclude that such tax is not and was not prohibited by any of the aforesaid treaties, statutory or constitutional pro-

visions; and in no way violates the tax exemptions granted to these plaintiffs and other allottees as to their said allotments, that nevertheless, under such circumstances and conditions, such a tax is and was wholly illegal and void and unenforcible as to these plaintiffs and other Indian allottees, similarly situated, for the following reasons, to-wit:

(a) That it is provided in Section 50 of Article 5 of the Constitution of Oklahoma, that the legislature of the State shall pass no law exempting any property within this state from taxation, except as otherwise expressly provided in said constitution. That it is further provided by Section 9959 C. O. L. 1921, that all property in this state is subject to taxation except such only as is expressly exempt by law; and that by virtue of said constitutional and statutory provisions of this state, all property within this state of every kind and character, both personal and real, is subject to taxation and is required to be taxed in some manner and form, except such only as is expressly exempt by some provision of the constitution of this state, or by some controlling Federal law. That no exemption exists as to minerals, such as oil and gas, which are stored in and are a part of the lands of individuals, and such mineral rights inherent to said lands within this state, other than those provisions relating to lands of Indian allottees, whose lands are exempt to them under the provisions of some Federal Law or Treaty; and that therefore, all such minerals and mineral rights attached to and inherent in such lands, including both the rights of lessees and royalty owners, other than those of Indian allottees whose lands are exempt to them from taxation under some Federal Law or Treaty, are required under the laws of this state to be taxed in some manner.

(b) That as expressly provided by the terms of Section 7464, C. O. L. 1921, under which the State Auditor purports to act in the cases herein referred to, and as construed by the Supreme Court of this State, said gross production tax is not a tax upon the minerals only after the same are severed from the soil, but is a property tax, the equivalent of an ad valorem tax, and in full and in lieu of all taxes by the

state, counties, cities, towns, townships and school districts, upon such minerals during the year in which the same are produced, and in addition thereto, upon the rights attached to or inherent in the rights to said minerals, upon the leases for petroleum or other crude oil or mineral oil or natural gas, and upon the mining rights and privileges for the minerals aforesaid belonging to or appertaining to the land and upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, and actually used in the operation of such well, and upon any investment in leases, rights, privileges, or other property referred to in said statute. That as to the producer of such minerals, said tax covers and includes not only the minerals produced during the taxable year, but also the lease or leases for oil and gas purposes upon said lands, and the amount invested therein (which is always of great value and of necessity must be taxed under the constitution of this state, unless expressly exempt by some Federal Law or Treaty), and upon the rights and privileges incident to said leases and the machinery, appliances and equipment in and around any well producing oil or gas and used in the operation thereof.

(c) That as to the land or royalty owner, said statute provides, and is so construed by the taxing officials of the State of Oklahoma, that such tax covers and includes not only such minerals as are produced during the taxable year, but also covers and includes and is levied and assessed upon the value of the royalty interest in the remaining minerals which are stored in the ground and the mineral rights attached to and inherent in said lands. That no higher value is placed by the taxing officials of this state for the purpose of an ad valorem tax upon lands highly productive of oil and gas than upon similar lands containing no such minerals, for the reason said gross production statute provides and is so construed by the taxing officials of this state, that said gross production tax is levied upon and includes the value of the mineral rights in said lands. Plaintiffs further say that in a majority of cases within this state, of lands producing oil and gas, that the royalty interest or mineral

rights incident to said lands including the minerals stored therein and the right to extract and remove such minerals therefrom, have been severed by a sale thereof by the fee owner, and in such cases, what is commonly called and designated the surface rights, which is taxable on an ad valorem basis, is owned by one person, and the title to such mineral rights and royalties, which property rights are of great value, and upon which no tax is paid other than said gross production tax, is vested in others, the plaintiffs say that to levy a tax upon plaintiffs' share of such minerals as are produced during the taxable year, while other persons owning like royalty interests in lands subject to taxation, are taxed at a lesser rate on the same class of property, for the reason that such tax is based upon and includes other property admittedly taxable, to-wit, the royalty interest in said lands, violates the provisions of Section 8, Article 10, of the Constitution of the State of Oklahoma, and constitutes the taking of the property of these plaintiffs and their assignors, without due process of law, and denies to them the equal protection of the law in violation of the provisions of the Constitution of Oklahoma, and of the 5th and 14th Amendments to the Constitution of the United States.

WHEREFORE, premises considered, plaintiffs pray that the defendant be summoned to appear and answer the petition of this plaintiff, and that upon final trial being had, that these plaintiffs have judgment against the defendant for the return of said illegal taxes in the total sum of $610.00, and for the costs of this action and for all other and further proper relief to which they may be justly entitled, and will ever pray.

SECOND CAUSE OF ACTION.

For their second cause of action, plaintiffs represent and state in addition to the matters and things set forth above:

(1) That Mattie L. V. Zachary, *nee* Morris, is a Choctaw Indian, duly enrolled as such opposite roll No. 590 of the approved rolls of the Choctaw and Chickasaw nation or

tribe of Indians, being enrolled as of 1/64th Choctaw blood. That by virtue of her citizenship in the said nation or tribe of Indians, the said Mattie L. V. Zachary, *nee* Morris, received as a portion of her allotment of the Choctaw and Chickasaw Nation or tribe of Indians, the following described lands and tenements situated in Carter County, Oklahoma, to-wit:

> The North half of the Northeast quarter of the Southeast quarter and the Southeast quarter of the Northeast quarter of the Southeast quarter of Section 29, and the Northwest quarter of the Southwest quarter of Section 28, and the Northeast quarter of the Northeast quarter of the Southeast quarter of Section 21, all in Township 2 South, Range 3 West,

for which patent was issued to her on December 5th, 1908; and by virtue of the allotment of said lands to the said Mattie L. V. Zachary, *nee* Morris, as aforesaid, she thereupon and thereby became, has ever since been and now is vested with an indefeasible fee simple title to said lands, in accordance with existing treaties between said nations or tribes of Indians and the United States Government, and the various acts of Congress in relation to said lands and the allotment in severalty thereof between the various members or citizens of said nation or tribe of Indians; and the said allottee, Mattie *V. L.* Zachary, *nee* Morris, never having parted with title to said lands or other interest therein other than as hereinafter set forth.

(2) Plaintiffs further allege and state that subsequent to the allotment of said lands to Mattie L. V. Zachary, *nee* Morris, she executed and delivered to the Gypsy Oil Company and the Sinclair Oil and Gas Company a lease covering said lands for oil and gas purposes, reserving unto the said Mattie L. V. Zachary, *nee* Morris, as the owner of said lands, a one-eighth royalty of all oil and gas which should be produced and saved therefrom by the lessees; and that under and in pursuance of said lease, said lessees have produced and are now producing oil and gas from said premises and are paying large sums of money to the said allottee as

royalty in accordance with the terms and provisions of said lease. That in the process of operating said leases and producing oil and gas therefrom by the lessees, the one-eighth portion of said minerals belonging to said allottee as royalties under the terms of said leases, are pumped immediately as the same are extracted from the earth, into the pipe lines and containers of the purchaser of such minerals, where the same are passed through meters to determine the amount of such royalty interest and the amount due said allottee therefor; and that the production and sale of such minerals in effect constitute one transaction.

(3) That the defendant herein is demanding of the said Mattie L. V. Zachary, *nee Morris,* in quarterly periods ending March 31st, June 30th, September 30th and December 31st, of each year respectively, the payment of which is commonly known as a gross production tax, equal to three percentum of the entire amount received by said allottee during each such quarter from the sale of the one-eighth royalty oil and gas reserved and accruing to said allottee from said lands under the terms and provisions of said lease, and that during the quarter ending December 31st, 1926, said allottee received the sum of $3,072.73 from the sale of said royalty oil and gas produced during said period on said lands by said lessees and said allottee received the sum of $3,702.06 during the quarter ending March 31st, 1927, from the sale of said royalty oil and gas produced during said period from said lands; and that thereafter and on or about the 30th day of April, 1927, the said Mattie L. V. Zachary, *nee* Morris, in compliance with the demand of the defendant for the payment thereof, paid to the defendant herein the sum of $92.18, being the equivalent of three per centum of the gross amount received by said allottee from the sale of said royalty oil and gas during the quarter ending December 31st, 1926, and on said date also paid to the defendant the sum of $111.06, being the equivalent of three percentum of the gross amount received by said allottee from the sale of said royalty oil and gas during the quarter ending March 31st, 1927, and that such payments were demanded and made as a tax, commonly known as a gross production tax upon

the proceeds of the sale of said royalty oil and gas and the royalty interest of said allottee in said minerals in and under the lands of said allottee above described from which the same were produced.

(4) That the payment of said tax by the said Mattie L. V. Zachary, *nee* Morris, as aforesaid, was made under duress and protest, and that at the time of the payment thereof the said Mattie L. V. Zachary, *nee* Morris, served a written notice of protest upon the defendant herein setting forth the grounds of objection to said tax and the reason of the invalidity and illegality of same, and in the manner and form as required by law. That a true copy of said notice of protest is hereto attached marked Exhibit "C" and made a part hereof. That the payment of said taxes was necessary to prevent the issuance of defendant's warrant for the collection of the same, and to prevent the stopping by the defendant of further payments accruing to said allottee from the sale of said royalty oil and gas.

(5) Plaintiffs further say that by reason of the facts stated in paragraphs 6 and 7 of their first cause of action herein, which facts apply with equal force as to said allottee, said lands and the issues, rents, revenues and proceeds arising therefrom, including said royalty oil and gas and the proceeds from the sale thereof, are exempt to said allottees and not subject to taxation in any manner or form, for any purpose, for a period of twenty-one years from the date of the issuance of patent to said allottee, which period has not expired, and plaintiffs herein re-plead and make the allegations of paragraphs 6 and 7 of their first cause of action, with such necessary changes and corrections as may be necessary to apply said matters and things to said allottee, a part and parcel of this, their second cause of action, as fully and completely as if set out at length in words and figures therein.

(6) Plaintiffs further say that subsequent to the payment of said tax, under protest by the said Mattie L. V. Zachary, *nee* Morris, to the defendant herein as aforesaid, said allottee, for a good and valuable consideration, duly

assigned, transferred and set over unto these plaintiffs all her rights, title and interest in and to said illegal taxes and her claim against the defendant herein for the return thereof, and that the plaintiffs are now the owners and holders of said claim against the defendant herein, and said illegal taxes, and they are now entitled to judgment against the defendant for the return of said excessive and illegal taxes, so paid by the said allottee as aforesaid.

WHEREFORE, plaintiffs pray for judgment against the defendant in the sum of $205.24, for costs of this action and to all other proper relief to which they may be entitled and will ever pray.

THIRD CAUSE OF ACTION.

For their third cause of action, plaintiffs allege and state that in addition to the matters and things hereinabove set forth:

(1) That Julia A. Morris, enrolled as Julia A. Powell, is a Choctaw Indian, duly enrolled as such opposite roll No. 409 of the approved rolls of the Choctaw nation or tribe of Indians, she being enrolled as of 1/32nd Choctaw blood. That by virtue of her citizenship, she received as a portion of her allotment of the allotable lands of the Choctaw and Chickasaw nations or tribes of Indians the following described lands and tenements situated in Carter County, State of Oklahoma, to-wit:

> The Northwest quarter of the Northeast quarter of the Southeast quarter of Section 21, Township 2 South, Range 3 West,

for which patent was issued to her on October 10th, 1906. That by virtue of said allotment of said lands to the said Julia A. Morris, she thereupon became, has ever since been and now is vested with an indefeasible title to said lands in accordance with the existing treaties between said nation or tribe of Indians and the United States Government and the various acts of Congress in relation to said lands and the allotment thereof in severalty between the various mem-

bers or citizens of said nation or tribe of Indians. That said allottee has never parted with title to said lands or any interest therein other than as hereinafter set forth.

(2) That thereafter said allottee, Julia A. Morris, executed and delivered to the Magnolia Petroleum Company, a corporation, of Dallas, Texas, an oil and gas lease covering said lands, by the terms of which said allottee reserved to herself, as the owner of said lands, a royalty of one-eighth of all oil and gas produced and saved from said premises by said lessee; and that in pursuance of exploration and development operations under the provisions of said lease, said lessee has produced and is now producing oil and gas in paying quantities and is paying royalty thereon to said allottee, as provided by the terms of said lease. That in the process of operating said lease and producing oil and gas therefrom by the lessee, the one-eighth portion of said minerals belonging to said allottee as royalties under the terms of said leases, are pumped immediately as the same are extracted from the earth, into the pipe lines or containers of the purchaser of such minerals, where the same are passed through meters to determine the amount of such royalty interest and the amount due this allottee therefor; and that the production and sale of such minerals in effect constitutes one transaction.

(3) That said defendant is demanding of the said Julia A. Morris at quarterly periods ending March 31st, June 30th, September 30th and December 31st, of each year respectively, the payment of a tax on said oil and gas royalty, commonly known as a gross production tax, equal to three per centum of the gross amount received by said allottee for each such quarter from the sale of such royalty, and that during the year of 1926 and the quarter ending March 31st, 1927, said allottee received the sum of $1,763.00 from the sale of said royalty produced during said period from said lands, and that thereafter and on or about the 30th day of April, 1927, said allottee, in compliance with the demand of the defendant herein for the payment thereof, paid to said defendant the sum of $52.89, being the equivalent of three per centum of the gross amount received by said allottee

from the sale of said royalty oil and gas during said period, and that said payment was demanded and made as a tax, commonly known as a gross production tax, upon the proceeds of the sale of said royalty oil and gas and upon the royalty interest of said allottee in said minerals in and under said lands above described, belonging to said allottee from which said royalties were produced. That the payment of said tax by the said Julia A. Morris was made under duress and protest and that at the time of the payment thereof, the said Julia A. Morris served a written notice of protest upon the defendant herein, setting forth the grounds of objection to said tax and the reasons of the invalidity and illegality thereof, all in the manner and form as required by law. A true copy of said notice of protest is attached hereto, marked Exhibit "D" and made a part of the petition. That said tax was paid to prevent the issuance of the defendant's warrant for the collection of the same, and to prevent the stopping by the defendant of further payments accruing to the allottee from the sale of said royalty oil and gas.

(4) Plaintiffs further say that by reason of the facts stated in paragraphs 6 and 7 of their First Cause of Action herein, which facts apply with equal force as to said allottee, said lands and the issues, rents, revenues and proceeds arising therefrom, including said royalty oil and gas and the proceeds from the sale thereof, are exempt to said allottees and not subject to taxation in any manner or form, for any purpose, for a period of twenty-one years from the date of the issuance of patent to said allottee, which period has not expired, and plaintiffs herein re-plead and make the allegations of paragraphs 6 and 7 of their First Cause of Action, with such necessary changes and corrections as may be necessary to apply said matters and things to said allottee, a part and parcel of this, their Third Cause of Action, as fully and completely as if set out at length in words and figures herein.

(5) Plaintiffs further state that subsequent to the payment of said illegal taxes, the said Julia A. Morris, for a good and valuable consideration, duly assigned, transferred

and set over unto this plaintiff all her right, title and interest therein, together with her claim against the defendant herein for the return thereof, and that the plaintiffs are now the owners and holders of said claim and are the owners of said illegal taxes, and are entitled to judgment against the defendant for the return of the same.

WHEREFORE, premises considered, plaintiffs pray for judgment against the defendant on this, their third cause of action, in the sum of $52.89, together with costs of this action and for such other and further relief to which they may be justly entitled and will ever pray.

Stephen A. George,
Attorney for Plaintiffs.

EXHIBIT "A"

NOTICE OF PROTEST.

To Hon. A. S. J. Shaw, State Auditor,
State Capitol Building,
Oklahoma City, Oklahoma.

Dear Sir:

We, the undersigned, hand you herewith remittance in the sum of $490.00, which is in payment of gross production tax in said sum demanded by you for the year ending December 31st, 1926, on account of oil and gas royalties accruing to the undersigned during said year, of the total cash value of $16,333.00, from certain lands belonging to the undersigned in Section 22, Township 2 South, Range 3 West, Carter County, Oklahoma, which were allotted to them by virtue of their citizenship in the Choctaw Nation or Tribe of Indians, the title to which said land has never passed out of the undersigned, and which said lands, together with the income derived therefrom is non-taxable in the hands of the undersigned during a period of twenty-one years from the date of the issuance of patents therefor, which period has not yet expired, under the provisions of an Act of Congress of June 28th, 1898, (30 Statute at Large 505, Chap. 517) and treaty provisions of Chickasaw or Choctaw Nations or Tribes of Indians, the United States government in relation to the allotment in severalty of the

lands belonging to said nations or tribes of Indians; as construed by the Supreme Court of the United States in the case of Choate vs. Trapp, 56 L. Ed. 941, and other cases.

You are further notified that said illegal taxes are paid under duress and protest, and to prevent the issuance of your warrant therefor and any action on your part to stop and prevent any payment of future royalties accruing to the undersigned from said lands, and that suit will be instituted against you for the recovery of said illegal taxes in the sum of $490.00 within the time and in the manner provided by law.

T. L. Carpenter and Lillie V. Carpenter
T. L. Carpenter
Lillie V. Carpenter

By Stephen A. George
Their Attorney.

State of Oklahoma
County of Carter—ss.

S. A. George, of lawful age, being duly sworn, deposes and says that he is the attorney for the above named protestants, T. L. Carpenter and Lillie V. Carpenter, and that he has read the foregoing protest, knows the contents thereof and that the matters and things therein set forth are true as he verily believes.

S. A. George.

Subscribed and sworn to before me this 27th day of April, 1927.

M. W. Eddleman
Notary Public.

(SEAL)

My Commission Expires Jan. 4, 1928.

Service and receipt of the foregoing notice of protest is acknowledged the 30 day of April, 1927.

A. S. J. Shaw
State Auditor

By W. C. McDonald
Deputy.

EXHIBIT "B"

NOTICE OF PROTEST.

To Hon. A. S. J. Shaw, State Auditor,
State Capitol Building,
Oklahoma City, Oklahoma.

Dear Sir:

We, the undersigned, hand you herewith remittance in the sum of $120.00, which is in payment of gross production tax in said sum demanded by you for the quarter ending March 31st, 1927, on account of oil and gas royalties accruing to the undersigned during said quarter, of the total cash value of $4,000.00, from certain lands belonging to the undersigned in Section 22, Township 2 South, Range 3 West, Carter County, Oklahoma, which were allotted to them by virtue of their citizenship in the Choctaw Nation or Tribe of Indians, the title to which said lands has never passed out of the undersigned, and which said lands, together with the income derived therefrom is non-taxable, in the hands of the undersigned during a period of twenty-one years from the date of the issuance of patents therefor, which period has not yet expired, under the provisions of an act of Congress of June 28, 1898, (30 Statute at Large 505, Chap. 517) and treaty provisions of Chickasaw or Choctaw Nations or Tribes of Indians, the United States Government in relation to the allotment in severalty of the lands belonging to said Nations or tribes of Indians; as construed by the Supreme Court of the United States in the case of Choate vs. Trapp, 56 L. Ed. 941, and other cases. You are further notified that said illegal taxes are paid under duress and protest, and to prevent the issuance of your warrant therefor and any action on your part to stop and prevent any payment of future royalties accruing to the undersigned from said lands, and that suit will be instituted against

you for the recovery of said illegal taxes in the sum of $120.00 within the time and in the manner provided by law.

T. L. Carpenter and Lillie V. Carpenter
T. L. Carpenter
Lillie V. Carpenter
By Stephen A. George
Their attorney.

State of Oklahoma
County of Carter—ss.

S. A. George, of lawful age, being duly sworn, deposes and says that he is the attorney for the above named protestants, T. L. Carpenter and Lillie V. Carpenter, that he has read the foregoing protest, knows the contents thereof and that the matters and things therein set forth are true as he verily believes.

Stephen A. George

Subscribed and sworn to before me this 27th day of April, 1927.

M. W. Eddleman
Notary Public.

(SEAL)

My Commission Expires Jan. 4, 1928.

Service and receipt of the foregoing notice of protest is acknowledged the 30 day of April, 1927.

A. S. J. Shaw
State Auditor
By W. C. McDonald
Deputy.

EXHIBIT "C"

NOTICE OF PROTEST.

To State Auditor
State Capitol Building
Oklahoma City, Oklahoma.

Dear Sir:

I hand you herewith certified check in the sum of $92.18 to cover gross production tax in the amount of said sum,

demanded by you for the quarter ending December 31st, 1926, on account of oil and gas royalties accruing to me for said quarter from the following lands, in section 22, 28 and 29, Township 2 South, Range 3 West, Carter County, Oklahoma, known as the Mattie Morris Leases, operated by the Gypsy Oil Company at Tulsa, and the Magnolia Petroleum Company of Dallas, Texas. Said lands from which said royalties accrue to the undersigned constitute a part of the lands which were allotted to the undersigned by virtue of her citizenship in the Choctaw Nation or Tribe of Indians, title to which said lands has never passed out of the undersigned, and which said lands together with the income derived therefrom is non-taxable in the hands of the undersigned during said period by reason of the provisions of Act of Congress, June 28, 1898 (30 Stat. at Large 505, Chap. 517, as construed in the case of Choate v. Trapp, 56 Law Ed. 941, and other cases); and by virtue of Treaty Provision of the Chickasaw and Choctaw Nations or Tribes of Indians with the United States Government in relation to the allotment in severalty of the lands belonging to said Nations or Tribes of Indians.

You are further notified that said illegal taxes are paid under duress and protest and to prevent the issuance of your warrant therefor and any action on your part to stop and prevent the payment of future royalties accruing to the undersigned from said lands and to prevent the accumulation of penalties on said illegal taxes, and you are hereby notified not to pay out or part with any of said illegal taxes so paid under protest and that suit will be instituted against you for the recovery of said illegal taxes in the total sum of $92.18, within the time and manner provided by law in such cases made and provided.

Mattie L. V. Zachary, *nee* Morris
By Stephen A. George
Her Attorney.

State of Oklahoma,
County of Carter—ss.

S. A. George, of lawful age, being duly sworn, deposes and says that he is the attorney for the above named pro-

testants, Mattie L. V. Zachary, *nee* Morris, that he has read the foregoing protest, knows the contents thereof and that the matters and things therein set forth are true as he verily believes.

Stephen A. George

Subscribed and sworn to before me this 27th day of April, 1927.

M. W. Eddleman
Notary Public.

(———)
My Commission Expires Jan. 4, 1928.

Service and receipt of the foregoing notice of protest is acknowledged the 30 day of April, 1927.

A. S. J. Shaw,
State Auditor
By W. C. McDonald
Deputy.

EXHIBIT "D"

NOTICE OF PROTEST.

To Hon. A. S. J. Shaw, State Auditor,
State Capitol Building,
Oklahoma City, Oklahoma.

Dear Sir:

I hand you herewith certified check in the sum of $111.06, which is in payment of gross production tax demanded by you for the quarter ending March 31st, 1927, on account of oil and gas royalties accruing to me for said quarter of the total cash value of $3,702.06, from the following described lands belonging to me, situated in Carter County, State of Oklahoma, to-wit: The North half of the NE quarter of the SE quarter and the SE quarter of the NE quarter of the SE quarter of Section 29,, and the NW quarter of the SW quarter of Section 28, and the NE quarter of the NE quarter of the SE¼ of Section 21, all in Township 2 South, Range 3 West; and you are hereby notified that said lands from which said royalties accrued to the unde-

signed, constitute a part of the lands which were allotted to the undersigned by virtue of her citizenship in the Choctaw Nation or Tribe of Indians, title to which said lands has never passed out of the undersigned, and which said lands, together with the income derived therefrom is non-taxable in the hands of the undersigned, during a period of twenty-one years from the date of the issuance of patent therefor, which has not yet expired, under the provisions of an act of Congress June 28th, 1898 (30 Statute at Large 505, Chapter 517), and treaty provisions of the Chickasaw and Choctaw Tribes or Nations with United States Government in relation to the allotment in severalty, for the lands belonging to said nations or tribes of Indians, as construed by the Supreme Court of the United States in the case of Choate vs. Trapp, 56 L. Ed. 941, and other cases.

You are further notified that said illegal taxes are paid under duress and protest and to prevent the issuance of your warrant therefor, and any action on your part to stop and prevent the payment of future royalties accruing to the undersigned from said lands, and to prevent the accumulation of penalties on said illegal taxes; and you are hereby notified not to pay out or part with any of said illegal taxes so paid under protest, and that suit will be instituted against you for the recovery of said illegal taxes in the sum of $111.06 within the time and in the manner provided by law in such cases made and provided.

Mattie L. V. Zachary, *nee* Morris
By Stephen A. George
Her Attorney.

State of Oklahoma
County of Carter—ss.

S. A. George, of lawful age, being duly sworn, deposes and says that he is the attorney for the above named protestant, Mattie L. V. Zachary, *nee* Morris, that he has read the foregoing protest, knows the contents thereof and that the matters and things herein set forth are true as he verily believes.

S. A. George

Subscribed and sworn to before me this 27th day of April, 1927.

M. W. Eddleman,
Notary Public.

(SEAL)

My Commission Expires Jan. 4, 1928.

Service and receipt of the foregoing notice of protest is acknowledged the 30 day of April, 1927.

A. S. J. Shaw
State Auditor,
By W. C. McDonald
Deputy.

EXHIBIT "E"

NOTICE OF PROTEST.

To Hon. A. S. J. Shaw, State Auditor,
State Capitol Building
Oklahoma City, Oklahoma.

Dear Sir:

I, the undersigned, hand you herewith remittance in the sum of $52.89, which is in payment of gross production tax in said sum demanded by you for the period of five quarters beginning January 1st, 1927, ending March 31st, 1927, on account of oil and gas royalties accruing to the undersigned during said period, of the total cash value of $1,763.00, from certain lands belonging to the undersigned in Section 21, township 2 South, Range 3 West, Carter County, Oklahoma, which were allotted to her by virtue of her citizenship in the Choctaw Nation or Tribe of Indians, the title to which said land has never passed out of the undersigned, and which said lands, together with the income derived therefrom, is non-taxable in the hands of the undersigned during a period of twenty-one years from the date of the issuance of patents therefor, which period has not yet expired, under the provisions of an Act of Congress of June 28th, 1898, (30 Statute at Large 505, Chap. 517) and treaty provisions of Chickasaw or Choctaw Nations or Tribes of Indians, the United States government in relation to the allotment in severalty of the lands belonging to said nations or tribes of Indians; as construed by the Supreme Court of the United States in the case of Choate vs. Trapp, 56 L.

Ed. 941, and other cases. You are further notified that said illegal taxes are paid under duress and protest, and to prevent the issuance of your warrant therefor and any action on your part to stop and prevent any payment of future royalties accruing to the undersigned from said lands, and that suit will be instituted against you for the recovery of said illegal taxes in the sum of $52.89 within the time and in the manner provided by law.

Julia Morris

By Stephen A. George
Her Attorney.

State of Oklahoma
County of Carter—ss.

S. A. George, of lawful age, being duly sworn, deposes and says that he is the attorney for the above named protestants, T. L. Carpenter and Lillie V. Carpenter, that he has read the foregoing protest, knows the contents thereof and that the matters and things therein set forth are true as he verily believes.

S. A. George

Subscribed and sworn to before me this 27th day of April, 1927.

M. W. Eddleman
(———) Notary Public.

My Commission Expires Jan. 4, 1928.

Service and receipt of the foregoing notice of protest is acknowledged the 30 day of April, 1927.

A. S. J. Shaw,
State Auditor.

By W. C. McDonald
Deputy.

Endorsements:

No. 52,682. In the District Court of Oklahoma County, State of Oklahoma. T. L. Carpenter and Lillie V. Carpenter, Plaintiffs, vs. A. S. J. Shaw, State Auditor of the State of Oklahoma, Defendants. Amended Petition. Filed in District Court Oklahoma County, Oklahoma, Jun 27, 1927. Cliff Myers, Court Clerk, by Nettie Blumenthal, Deputy.

AND THEREAFTER, in said court, in said cause, came the defendant, on July 5, 1927, and duly filed, in writing, his certain demurrer to the amended petition of the plaintiffs, a true copy thereof, with all endorsements thereon, being as follows:

In the District Court of Oklahoma County, State of Oklahoma.

T. L. Carpenter and
Lillie V. Carpenter,
Plaintiffs,

vs.

A. S. J. Shaw, State Auditor
of the State of Oklahoma,
Defendant.

No. 52682.

DEMURRER TO AMENDED PETITION.

Comes now the defendant and demurs, generally and specially, to the amended petition of plaintiffs herein and to each and every cause of action therein stated, and for grounds of objection, states:

FIRST: That the facts stated in said amend-ed petition and in each cause of action thereof are insufficient to entitle plaintiffs to the relief prayed for, for the reason that all of taxes alleged to have been paid by plaintiffs and the assignors of plaintiffs in each cause of action for the year ending December 31, 1926, were not paid at the time and in the manner provided by law.

SECOND: That the facts stated in plaintiffs' amended petition, and in each count thereof, are insufficient to constitute a cause of action in favor of plaintiffs and against the defendant for the reason that facts are not stated in any of said counts which show that plaintiffs and the assignors of plaintiffs are exempt from the payment of the gross production tax on the royalty interest.

THIRD: That the facts stated in plaintiffs' amended petition, and each count thereof, are insufficient to entitle plaintiffs to the relief prayed for or to any relief for the reason that the same are insufficient to show that any property is unlawfully exempt from taxation or that plaintiffs have been denied due process of law or the equal protection of the law.

FOURTH: That the facts stated in plaintiffs' amended petition and in each cause of action thereof are insufficient in law to constitute a cause of action in favor of the plaintiffs and against the defendant, or to entitle plaintiffs to the relief prayed for, or to any relief.

Edwin Dabney, Attorney General,
By V. P. Crowe, Assistant Attorney General.

Plaintiffs hereby consent to filing the above demurrer out of time.

Stephen A. George,
Att'y for Plaintiffs.

Endorsements:

—No. 52682—(Omitting the title)—Demurrer to Amended Petition.—Filed in District Court Oklahoma County, Oklahoma, July 5, 1927.

Cliff Myers, Court Clerk, by Carl Traub, Deputy.

AND THEREAFTER, in said court, on July 11, 1927, a judicial day of the May 1927 term thereof, and on October 20, 1927, a juridical day of the September, 1927 term thereof, proceedings were had and things done in said cause, as is shown by the journal entry, in writing, signed by the trial judge of said cause in said court, a true copy thereof, with all endorsements thereon, as the same appears on file in said cause and of record in Journal 105 of said court, at page 46, being as follows:

In the District Court of Oklahoma County, State of Oklahoma.

T. L. Carpenter and
Lillie V. Carpenter,
Plaintiffs,

vs.

A. S. J. Shaw, State Auditor
of the State of Oklahoma,
Defendant.

No. 52682.

ORDER.

This cause come on to be heard in its regular order on the 11th day of July, 1927, upon the demurrer of the defendant to the amended petition of the plaintiffs' filed herein; the plaintiffs appearing by and through their attorney of record, Stephen A. George, and the defendant appearing by and through his attorney of record, V. P. Crowe, Assistant Attorney General of the State of Oklahoma; whereupon the parties announced ready for hearing on said matter. And the court having heard said demurrer and the arguments of counsel, took said cause under advisement until this the 20th day of October, 1927; and the court being now fully advised in the premises, is of the opinion that said demurrer should be sustained.

IT IS THEREFORE CONSIDERED, ADJUDGED AND DECREED BY THE COURT that the demurrer of the defendant to the plaintiffs' amended petition be, and the same is hereby in all

things sustained, to which action of the court the plaintiffs at the time duly except; and the plaintiffs having declined to plead further, and having elected to stand upon their amended petition filed in this cause, it is further ordered that the plaintiffs' cause of action be dismissed, at the costs of the plaintiffs; to all of which the plaintiffs duly except and exceptions allowed. Whereupon, the plaintiffs give notice in open court of their intention to appeal herefrom to the Supreme Court of this State, and request that the Clerk be instructed to make notation thereof upon his docket, which is accordingly done; and the plaintiffs having requested an extension of time in which to prepare and serve case made, it is further ordered, for good cause shown, that the plaintiffs be granted an extension of sixty days from this date in which to prepare and serve case-made, and the defendant is given ten days after service of the same to suggest amendments thereto, the same to be signed and settled upon three days notice by either party.

Sam Hooker, District Judge.

O. K.: Stephen A. George
V. P. Crowe, Ass't Att'y Gen'l.

Endorsements:

—No. 52682—(Omitting the caption)—Order.—Filed in District Court Oklahoma County, Okla. Oct 27 1927. Cliff Myers, Court Clerk, By Nettie Blumenthal, Deputy.—Recorded: Book 105, Page 46.

In the Supreme Court of the State of Oklahoma.

T. L. Carpenter and Lillie V. Carpenter,
Plaintiffs in Error,

vs.

A. S. J. Shaw, State Auditor of the
State of Oklahoma,
Defendant in Error.

No. 19,122.

SYLLABUS.

1. By Section 9971, C. O. S. 1921, the right to maintain an action for the recovery of an illegal tax is condi-

tioned on compliance with all requirements therein contained, one of which is that the amount of taxes assessed shall be paid at the time and in the manner provided by law. Where a petition on its face shows that there has been no compliance with one of the essential requisites, it fails to state a cause of action.

2. Oil when discovered and reduced to possession by being detached from the soil in which it is embeded becomes and is personal property and is subject to State Gross Production Tax.

3. By the provisions of the Act of Congress of June 28, 1898, 30 Stats. 495, known as the Atoka Agreement, the allotments of Choctaw and Chickasaw Indians were made to be exempt from taxes so long as title remained in the original allottees not exceeding twenty-one years from the date of patent, but said exemption from taxation did not extend to personal property.

4. By Act of Congress, May 27, 1908, 35 Stats. 312, Restriction from alienation was removed from all lands of allottees of the Five civilized tribes enrolled as intermarried whites, freedmen and mixed blood Indians having less than one-half Indian blood, including minors, and in consequence thereof appellants were at liberty to execute oil and gas leases to their lands without interference or regulation on the part of a federal government agency. *Held* oil produced under a royalty interest is subject to the gross Production Tax of the State of Oklahoma, notwithstanding that the land upon which the oil was produced is exempt from taxation.

5. Oil discovered and reduced to possession is personal property and is not exempt from State taxation by the Constitution of the State of Oklahoma.

6. The property upon which the tax in question was levied is not exempt from State taxation by the Constitution of the United States, or by an Act of Congress, or Treaty with the Indians.

7. The gross production tax of the State of Oklahoma as levied under the facts in the instant case, is not a tax upon a federal instrumentality.

Error from the District Court of Oklahoma County, State of Oklahoma.

Honorable Sam Hooker, Judge.

Action by T. L. Carpenter, et al, for the recovery of gross production taxes paid the State Auditor. A demurrer to the petition of plaintiffs sustained, from which appeal is perfected. Affirmed.

Stephen A. George,
For Plaintiffs in Error.

Edwin Dabney, Attorney General,

V. P. Crowe, Assistant Attorney General,

For Defendant in Error.

RILEY, J.

This is an appeal by the plaintiffs below from a judgment against them denying recovery of gross production taxes paid the State Auditor under protest and upon oil and gas produced from lands situated in Carter County.

In the first cause of action it was alleged that T. L. Carpenter was enrolled as a Choctaw Indian by inter-marriage, and that Lillie B. Carpenter was enrolled as a Choctaw Indian of one-sixteenth blood, and that they own allotments located in Carter County from which oil and gas was produced during the calendar year 1926, and that for the year ending December 31, 1926, plaintiffs received the sum of $16,333.00, from the sale of royalty oil and gas produced from their allotments, and that during the quarter ending March, 1927, plaintiffs received the sum of $4,000.00, for the amount of royalty oil and gas produced from their lands and that on April 30, 1927, plaintiffs paid to the defendant the sum of $490.00, the same being equivalent to three per cent of the gross amount received from the sale of said

oil and gas during the year ending December 3, 1926, and at the same time they paid the defendant $120.00, as gross production tax on oil produced for the quarter ending March 31, 1927, and that both sums were paid under portest, and upon production representing the royalty interest to such minerals from the lands described.

In the second cause of action it was alleged that Mattie L. V. Zachary was enrolled as a Choctaw Indian of one-sixty-fourth blood and possessed an allotment in Carter County from which oil was produced under lease executed by her on her allotment to the Gypsy Oil Company and the Sinclair Oil & Gas Company, which lease reserved to her a one-eighth royalty of all oil and gas produced, and that the said Zachary had on the 30th day of April, 1927, paid the State Auditor the sum of $72.18, being three per cent of the gross amount of royalty oil and gas received by her during the quarter ending December 31, 1926, and on the same date paid the State Auditor the sum of $111.06, an equivalent of three per cent of the royalty received during the quarter ending March 31, 1927, and that said payments were made under protest as required by law, and that her cause of action for recovery of said taxes has been assigned to plaintiffs below, and suit has been commenced to recover the same within thirty days.

In the third cause of action it was alleged that Julia A. Morris was enrolled as a one-thirty-second blood Choctaw Indian and has received an allotment in Carter County upon which she has executed a lease to the Magnolia Petroleum Company, and reserved to herself a one-eighth interest as royalty, and that for the calendar year ending December 31, 1926, and the quarter ending March 3, 1927, she had paid to the State Auditor, under protest on April 30th, 1927, three per cent of the moneys received as royalties and that the said Julia A. Morris had assigned to the defendant below her cause of action for the recovery of said gross production taxes so paid.

In each of the causes of action it was alleged that the allottee had not parted with title to the said allotments and

that twenty-one years from date of patent had not expired and that by virtue thereof, said minerals so produced were not subject to the gross production tax Act of the State of Oklahoma. It also appears from the allegations of each cause of action that none of the gross production tax due for the calendar year 1926, was paid at the time and in the manner as provided by law, but that they were all paid when the first quarter annual period tax for the year 1927, was paid, which was on April 30, 1927. The taxes due on said mineral for the quarter ending March 31, 1927, were paid at the time and in the manner provided by law.

A Demurrer to the petition of plaintiff was sustained by the District Court and plaintiffs below elected to stand upon their petition. The trial court rendered judgment dismissing the cause, from which the plaintiffs in error appeal.

We first consider the procedure adopted by plaintiffs relative to the time of payment of the gross production tax claimed for the year ending December 31st, 1926.

Section 9814, C. O. S. 1921, provides and levies gross production tax of three per cent upon minerals produced within this State, and specifies the time and manner of payment, and provides the procedure to be followed for the recovery of such taxes paid under protest. That section reads in part as follows:

> "Every person, firm, association or corporation engaged in the mining or production within this state of asphalt or of ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other crude oil or other mineral oil or of natural gas, shall within thirty days after the expiration of the quarter annual period ending on the last day of March, A. D., 1916, and of each quarter annual period thereafter expiring respectively, on the last day of June, September, December and March of each year, file with the State Auditor, a statement under oath, on forms prescribed by him showing the location of each mine or oil or gas well operated by such person, firm, corporation or association during

the last preceding quarter annual period; the kind of such mineral oil or gas produced; the gross amount thereof produced and the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable and whether it is claimed that such royalty is exempt from taxation by law, and the facts on which such claim of exemption, if any, is based; and such other information pertaining thereto as the State Auditor may require, and shall at the same time pay to the State Auditor a tax equal to one-half of one per centum of the gross value of asphalt and of ores bearing lead, zinc, jack, gold, silver and copper produced, less the royalty interest, and equal to three per centum of the gross value of the production of petroleum or other crude or mineral oil and of natural gas, less the royalty interest. The owner of any royalty interest shall pay to the State Auditor the tax herein imposed upon such royalty interest within the time and in the manner provided by this Act.

"The tax hereby declared shall also attach to and is levied on what is known as the royalty interest except such royalty interest of the State of Oklahoma or such royalty interests as are exempt from taxation under the laws of the United States and the amount of the tax on the royalty interest shall be a lien on such interest * * * * * * *.

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, township, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper, or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing

asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; but any interest in the land other than that herein enumerated, and hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time."

From a reading of the quoted portion of the Act it will be noted that the amount of oil produced is required to be reported to the State Auditor within thirty days after each quarter annual period, which periods expire on the last day of June, September, December and March of each year. Payment of gross production taxes is required to be made upon those dates, consequently gross production taxes due for the first quarter of the year, 1926, were required to be made not later than April 30th, 1926, and payment for the second quarter was required not later than July 30th, 1926, and payment for the third quarter not later than October 30th, 1926, and for the fourth quarter not later than January 30th, 1927. None of the taxes due and payable for the calendar year, 1926, were paid on the dates required, but payment therefor was made on the later date of April 30th, 1927, consequently it appears that only the taxes due for the quarter ending March 31st, 1927, were paid at the time and in the manner provided by law.

Plaintiffs' cause of action for the recovery of these taxes is based upon Section 9971, C. O. S. 1921, which provides:

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the

manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days and if within such time summons shall be served upon such officer in a suit for recovery of such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

The applicable section quoted requires as a prerequisite to the recovery of taxes that the same shall be paid at the time and in the manner provided by law.

In St. L. & S. F. Ry. Co. v. Hendrickson, County, Treasurer, 127 Okla. 243, construing the above section, this court said:

"By section 9971, C. O. S. 1921, the right to maintain an action for the recovery of an illegal tax is conditioned on compliance with all the requirements therein contained. And in such case, where a petition on its face shows that one of the essential requisites has not been complied with, it fails to state a cause of action, and is fatal on demurrer."

See also: St. L. & S. F. Ry Co. v. Hendrickson, 128 Okla. 266; Okla. News Co. v. Ryan, 224 P. 969; Natl. Bk. of Muskogee v. Pitts, 249 P. 907; State ex rel Mothersead v. Bennett, 114 Okla. 76, 243 P. 726.

We, therefore, hold that unless taxes are paid at the time and in the manner provided by law, they cannot be recovered under the procedure provided by Section 9971, supra. It follows that plaintiffs were not entitled to maintain their action in so far as was concerned recovery of taxes due for the year ending December 31, 1926, for the reason that said taxes were not paid until April 30th, 1927, and, therefore, not at the time and in the manner provided by law.

Appellants seek to avoid the rule above announced by applying the decision of the Supreme Court of the United States in Ward v. Board of County Commissioners, Love County, 253 U. S. 17, 64 L. Ed. 751. It appears that case concerned the action of the plaintiff and sixty-six other Indians to recover taxes which they had paid in Love County, Oklahoma, on lands which had been held exempt from taxation by the decision of Choate vs. Trapp, 224 U. S. 665, and it appears that plaintiffs had failed to give notice of protest at the time of payment of such taxes. That decision considered whether or not the taxes were paid at the time and in the manner provided by law. The Supreme Court of the United States held that inasmuch as the Indians had had numerous law suits pending in numerous places resisting the collection of taxes that it could not be said that the taxes were voluntarily paid, and the second syllabus of the reported case, is as follows:

> "Indian allottees who, through pending suits and otherwise, were objecting and protesting that the collection of certain sums from them by a county as taxes on their allotments was forbidden by a law of Congress, cannot be said to have paid such taxes voluntarily, so as to defeat their right to compel restitution, when, notwithstanding such protest, the county demanded payment of the taxes, and by threatening to sell the lands and by actually selling other lands similarly situated, made it appear to such allottees that they must choose between paying the taxes and losing their land, with the result that, to prevent a sale and to avoid the

imposition of a penalty of 18 per cent, they yielded to the county's demand and paid the taxes, protesting and objecting at the time that the same were illegal."

There it was decided that where the State's statute provided that taxes voluntarily paid could not be recovered, such provision did not bar recovery in that cause because the facts showed that payment was not voluntarily made. As we view it that decision is not decisive of the issue here.

Plaintiffs also rely upon the case of Walker et al vs. Hays, 44 O. A. C. R. 93, 127 Okla. 123. There the taxes levied were upon a dwelling house which a full-blood Choctaw Indian had built upon an allotment, which allotment was exempt from taxation. This court held that the houses were a part of the realty; that the realty was exempt and that equitable relief was available to prevent a tax sale of the realty for the reason that the whole assessment was void ab initio. That decision is not decisive as to the manner of payment unless it can be said that the levy is wholly void which contingency is dependent upon whether or not the property taxed personal property or real estate, which is hereafter considered.

The decision of McCoy v. Childers, 124 Okla. 256, 256 P. 25, is decisive of the issue as to the manner of payment and concerns an action to enjoin the collection of gross production taxes upon a royalty interest of an Indian situated exactly as are plaintiffs in error. An appeal from the decision in that case was prosecuted to the Supreme Court of the United States and by the opinion there rendered, the judgment of this court in effect was affirmed in McCoy v. Shaw, 72 L. Ed. 584. Therefore, we hold as to the recovery of the taxes paid for the calendar year 1926, plaintiffs below failed to state a cause of action, because such taxes were not paid at the time and in the manner provided by law, and as to the cause of action for the recovery of such taxes, the demurrer was properly sustained.

Appellant contends that royalties of these plaintiffs are not subject to the payment of the gross production tax of the State of Oklahoma for the reason that the tax exemp-

tion period under which their lands were allotted to them has not expired, and a tax on such royalties is in fact a tax on said exempt lands, whether (a) said mineral royalties are attempted to be taxed as such, or (b) whether they be considered as ordinary rents and produce of said land.

For our determination whether appellant's property is exempt from taxation under any Act of Congress, it is necessary to consider briefly the Acts of Congress relating to the land of plaintiffs below.

By the Act of Congress, June 28, 1898, 30 Stats. 495, commonly known as the Atoka Agreement, and relating to the Choctaw and Chickasaw Nations, a separate allotment for each of said Indians was provided. Such allotments were made to be exempt from taxes for a specified period. The provision is:

> "All allotted land shall be non-taxable so long as title remains in the original allottee, not exceeding, however, twenty-one years from the date of patent."

It is the contention of the appellants that oil produced from their lands is exempt from taxes by reason of the above provision.

Subsequent to the enactment of the Atoka Agreement, Congress passed the Act of May 27, 1908, 35 Stats. 312, which provided in part as follows:

> "From and after sixty days from the date of this Act the status of the lands allotted hereafter or hereinafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or encumbrances, shall be as follows: 'All lands including homesteads of said allottees enrolled as intermarried whites, as freedmen, and as mixed blood Indians having less than one-half Indian blood, including minors shall be free from all restrictions.' * * * * That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."

The quoted provision of the Act of Congress of May 27, 1908, applies to the appellants in this case, who are less than one-half Indian blood, in so far as the Act of Congress remains intact. In other words restrictions against alienations as to these plaintiffs was by said Act removed and by reason of that Act appellants were free to sell their land, or to lease the same, or to dispose of it in any manner they saw fit without the aid of governmental supervision. It will be noted also that Congress attempted, by the Act, to make the lands upon which restrictions against alienation were removed, taxable, but the validity of that portion of the Act which sought to make the lands of less than one-half blood Indians subject to taxation was presented to the Supreme Court of Oklahoma in Choate v. Trapp, supra, and finally was passed upon by the Supreme Court of the United States in Choate v. Trapp, supra, and the Supreme Court of the United States held by the third paragraph of the syllabus:

> "Choctaw and Chickasaw allottees, under the Atoka Agreement embodied in the Act of June 28, 1898, under which, in part consideration of the relinquishment of all claims to the tribal property, they were to receive allotments of the lands in severalty which were to be non-taxable for a specified period, while the title remained in the original allottees, acquired vested rights of exemption from state taxation, protected by U. S. Constitution, 5th Amendment, from abrogation during that period, as was attempted by the Act of May 27, 1908 (35 Stat. at L. 312, Chap. 199), removing the restrictions upon alienation, and providing that lands from which such restrictions had been removed should be subject to taxation."

And in the body of the opinion:

> "The provision 'that all lands shall be non-taxable' naturally indicates that the exemption is attached to the land, * * * * only an artificial rule can make it a personal privilege."

The case of Choate v. Trapp, supra, announces the principle that Congress was without authority to abrogate the

vested right of an Indian to non-taxable land for a definite period, however, that decision deals solely with the right of the State to tax the Indian's land and does not consider personal property belonging to such Indians, nor oil produced from such land.

Cooley on Taxation, p. 146, lays down the rule that: "the intention to exempt must in any case be expressed in clear and unambiguous terms."

In Llewellyn v. Colonial Trust Co., 72 L. Ed. 19, it was held:

> " Tax exemptions are never lightly to be inferred."

In Goudy v. Meith, 203 U. S. 46, 51 L. Ed. 130, it was there considered whether the lands owned by an Indian were exempt from taxation. It was said:

> "His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemptions for him must be the same as for other citizens—that is that no exemption exists by implication, but must be clearly manifested."

Therefore, it is our view that Congress, by its Act known as the Atoka Agreement, exempted from taxation only the land of these appellants, and by reason of the principle that exemptions from taxation by implication are not favored, and since Congress has evidenced its desire to tax the lands of these appellants, that such tax exemption should not extend to the oil produced from said land. This for the reason that the oil as taxed is severed from the land and has become personal property and not subject to the exemption which extends to the land.

In the case of Forbes v. Gracey, 94 U. S. 762, an action was brought to force the collection of the Nevada gross production tax. The tax by the State of Nevada was imposed upon the proceeds of a mine worked by a corporation. Payment of the tax was resisted on the ground that title to the land from which the mineral was taken was in the United States, and for that reason not subject to State taxation.

In the cited case it was held that the State had power to impose the tax in question upon the minerals taken from the land; that the moment the ore became detached from the soil in which it was embedded it became personal property subject to taxation, although the land from which it was taken was not taxable. The decision contains the following language:

> "It is very true that Congress has, by statutes and by tacit consent, permitted individuals and corporations to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the government, without exacting or receiving any compensation for these ores, and without requiring the minor to buy or pay for the land. It has gone further, and recognized the possessory rights of these minors, as ascertained among themselves by the rules which have become the laws of the mining districts as regards mining claims. See Revised Statutes, Title XXXII, Chap. 6, Section 2318-2352. But in doing this it has not parted with the title to the land, except in cases where the land has been sold in accordance with the provisions of the law on that subject. If the tax of the State of Nevada is, in point of fact, levied on this property right of the United States, we are bound by our previous decisions and by sound principle to hold that it is void. If, on the other hand, it is levied on property of the minor, and may be collected without affecting or embarrassing the title of the United States to property which belongs to that government, then there is no ground for interference with the processes of the State in its collection. A few extracts from the statute of Nevada showing the nature and character of the property on which the contested tax is imposed, and the manner of its enforcement and collection, will enable us to decide whether it belongs to the one or the other of these classes. We copy here the important sections of the Act of Feb. 28, 1871, imposing this tax: (Here the court quotes the statutes) * * * * .

"As we construe the statutes of the United States and the recognized rule of the government on this subject, the moment this ore becomes detached from the soil in which it is embeded it becomes personal property, the ownership of which is in the man whose labor, capital and skill has discovered and developed the mine and extracted the ore or other mineral product. It is then free from any lien, claim, or title of the United States, and is rightfully subject to taxation by the State as any other personal property is.

"The trust of this proposition is too obvious to need or admit of illustration or elaboration, and, as we have already said, the pressure of business does not admit of it.

"In regard to the taxing of this personal property, and the mode of collecting it by sale as provided in the section last cited, it does not seem to us that there can be any ground for asserting that the United States has any interest in the tax or in the sale of the property taxed."

The lands involved in the cited case were as free from State taxation as the lands involved in the case at bar, yet in the cited case, notwithstanding the fact that the lands were non-taxable, the court held, and we follow the rule, that when the minerals were produced, they became personal property and as such were subject to taxation.

Plaintiffs contend that the foregoing case is not analagous to the instant case in that in the case cited the Government did not own the minerals, where in this case the appellants enjoy the royalty interest in the minerals sought to be taxed.

We hold such contention is a distinction without a difference.

A controlling principle of the cited case is that though the lands from which minerals are produced are exempt from taxation, minerals when produced and severed from the soil become personal property and as such the exemp-

tion from taxation as to the land cannot be extended to such personal property. Moreover, Choate v. Trapp, supra, sets out that plaintiffs in error tax exemption attaches to the land itself and is not a personal privilege. It is therefore appears to us immaterial that appellants owned the oil here sought to be taxed.

Morever, the royalty interest of appellants under the leases in fact is merely a payment to them as owner of the land upon which the production exists, varying according to the amount actually gotten, reduced to possession, secured, severed from the soil, etc.

In the case of Elders v. Wood, 208 U. S. 226, the gross production tax Act of the State of Colorado was upheld. In that case it was contended that the tax levied upon products from mines situated upon land granted by the United States was invalid for the reason that the operation of such mines was a federal agency which was exempt from a State tax, but the opinion held that the products obtained from the mines were property belonging to the operators, and the court said:

> "Such an interest from early times has been held to be property distinct from the land itself, vendable, inheritable and taxable."

See also: Belk v. Meager, 104 U. S. 283;
Manuel v. Wulff, 152 U. S. 505;

St. Louis Mining & Milling Co. v. Montana Mining Co., 171 U. S. 650.

In Kelly v. Ohio Oil Co., 39 L. R. A. 765, the Supreme Court of Ohio held:

> "Petroleum oil is a mineral, and while in the earth it is part of the realty, and, should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and, if it moves to the next adjoining tract, IT BECOMES part and parcel of that tract; and it forms part of some tract until it reaches a well, and is raised

to the surface, and then for the first time it becomes personal property—the property of the person into whose well it came. And this is so whether the oil moves, percolates, or exists in pools or deposits. In either event, it is the property of, and belongs to, the person who reaches it by means of a well, and severs it from the realty, and converts it into personalty. * * * "

See also: Nonamaker v. Amos, 76 L. E. 949, 4 L. R. A. (N. S.) 980; Kelley v. Keys, 62 Atl. 911, (Pa.).

In Barnes v. Keys, 36 Okla. 6, 127 P. 261, it was held: "Oil in place is a mineral and being a mineral is part of the realty." While the last cited case did not distinguish between the nature of the property after it had been reduced to possession and produced, it would be reasonable that the counterpart would be true, that is, that after the mineral is severed from the ground and reduced to possession it would become personal property. Such conclusion is borne out by the authorities heretofore cited. Since only the land of plaintiffs in error is exempt from taxation, such exemption should not be extended to personal property, and the trend of recent decisions seems to support this view. Shaw v. Gibson-Zopniser, 72 L. Ed. 369.

We now note cases relied upon by plaintiffs in error. As heretofore set out, Barnes v. Key, supra, is not decisive of the issue here. That case does not hold that oil when severed from the soil is anything other than personal property.

Appellants cite State ex rel v. Snyder, 212 P. 758, (Wyo.) and the fourth paragraph of the syllabus thereof, which is as follows:

"Under Act of Admission, Section 4, granting school lands to the State, but by Section 13, excluding mineral lands, and Section 5, requiring disposition by public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended for maintenance but permitting five years leases, and under Const. Art. 7, Sec. 2, declaring proceeds from such sales or leases to be a perpetual fund,

and Const, Art. 7, Sec. 7, restricting application of rents from unsold lands to the support of free schools, Held, that rents and royalties derived from oil leases are not the ordinary rents contemplated by Const., Art. 7, Sec. 7, but arise from and represent the corpus of the land, and must be treated as principal becoming part of the permanent school fund, and Laws 1921, c. 66, and Laws 1921 c. 147, amending Comp. St. 1920, Sec. 144, are unconstitutional in so far as authorizing diversion of oil rents and royalties from the permanent fund."

It will be noted that the Wyoming Court held under the constitutional provision cited that the proceeds from the sale of school land should constituted a permanent school fund, consequently that rents and royalties should go to the permanent school fund because they were proceeds from school lands.

That decision would be applicable had Congress exempted the lands of the Indians here concerned as well as the proceeds from their lands, but the Act of Congress under consideration exempts only the land alone from taxation, and such exemption cannot be extended by our decision.

Appellant cites State ex rel v. Hatcher, 281 S. W. 92, wherein the Supreme Court of Texas dealt with the question that was before the Supreme Court of Wyoming in the Snyder case, supra, and the Texas Court held:

"Oil is part of 'land' and can be sold in place."

The constitutional provision is substantially the same as that of Wyoming in that it required the proceeds from the sale of school lands to go to the permanent school fund. The Texas Court held that the rents and royalties were the proceeds from school lands and should go to the permanent school fund and that the Act of the Legislature which permitted the use of said money for the construction of buildings for the University of Texas was unconstitutional. The Texas Court said:

"If it should be contended that oil, when severed from the land, becomes personalty, that fact is immaterial and would not change the status of such property. It is provided in our Constitution that the 'proceeds' of the land which is gone shall become part of the permanent fund. In other words, not only the realty, but the resulting personalty is a part of that fund. Of course, proceeds arising from an alienation or taking of land, or any portion thereof, should always be in the permanent fund. It was foreseen that it might be best to sell it. In that event it was expressly provided that the substitute for the land should take its place in the permanent fund."

From the quotation above set out, it appears that it was the view of the Texas Court that oil when severed from the land became personalty, but such fact was immaterial because of the particular constitutional provision applicable to the proceeds from such land.

Appellants cite the case of Pollock v. Farmers Loan & Trust Co., 157 U. S. 429, in which was considered the validity of an Act of Congress levying an income tax without regard to the rule of apportionment as required by the Constitution of the United States. The first question there considered was whether a tax on the rental or income of real estate was a direct tax within the meaning of the Constitution, and it was held that the same constituted a direct tax requiring apportionment among the State, the same as a tax upon the land itself, and it was held that an income tax upon rents from lands, not apportioned as required by the Constitution among the States, was invalid because it was a direct tax. That such is proper construction of the holding in the Pollock case is evidenced by the holding in Evans v. Gore, 253 U. S. 244, where the question involved was as to whether or not the federal government could levy an income tax on the salary of a federal judge, and where it was held that the Constitution of the United States prevented the deminution of the emoluments of a federal judge during his term of office. That opinion recites:

"Let us turn, then, to the circumstances in which

this amendment was proposed and ratified, and to the controversy it was intended to settle. By the Constitution all direct taxes were required to be apportioned among the several states according to their population, as ascertained by a census or enumeration (Art. 1, Sec. 2, CL. 3, and Sec. 9, CL. 4), but no such requirement was imposed as to other taxes. And apart from capitation taxes, with which we now are not concerned, no rule was given for determining what taxes were direct and therefore to be apportioned, or what were indirect and not within the requirement. Controversy ensued and ultimately centered around the right classification of income from taxable real estate and from investments in taxable personal property. The matter then came before this court in Pollock vs. Farmers' Loan & T. Co., 157 U. S. 429, 39 L. Ed. 759, 15 Sup. Ct. Rep. 673; 158 U. S. 601, 39 L. Ed. 1108, 15 Sup. Ct. Rep. 912; and the decision, when announced, disclosed that the same differences in opinion existing elsewhere were shared by the members of the Court—five, the controlling number regarded a tax on such income as in effect a direct tax on the property from which it arose, and therefore as requiring apportionment. Much of the law then under consideration had been framed according to the latter view, and because of this and the adjudged inseparability of other portions the entire law was held invalid. Afterwards, to enable Congress to reach all taxable income more conveniently and effectively than would be possible as to much of it if an apportionment among the States were essential, the Sixteenth Amendment was proposed and ratified. In other words, the purpose of the Amendment was to eliminate all occasion for such an apportionment because of the source from which the income came,—a change in no wise affecting the power to tax, but only the mode of exercising it."

Consequently as we view it these decisions relied upon by the appellant are not decisive of the issue in his favor.

It is next contended by the appellant that the enforcement of this tax is in violation of Section 8, Art. 10, of the Constitution of Oklahoma, as well as the Fifth and Fourteenth Amendments to the Constitution of the United States.

The appellants point out that Section 8, Art. 10, of the Constitution of Oklahoma requires all property to be assessed at its fair cash value, and that Section 5, Art. 10, supra, requires that taxes be uniform upon the same classes of subjects, and that Section 5, of Art. 5, of the Constitution of Oklahoma specifies that all property except as is expressly therein exempt shall be subject to taxation.

All of these questions presented have been adversely determined by this Court.

As to whether or not such gross production tax Act constituted an exemption from taxation of that property in lieu of which the gross production tax was levied was decided in In re Gross Production Tax of Wolverine Co., 154 P. 362, in which this Court said:

> "As to those liable to and who pay a gross production tax, it will be noted that the Act does not in terms exempt equipment and machinery, but provides that the payment of the gross production tax shall be in lieu of any other tax that might be levied and collected on said property upon ad valorem bases. This is not an exemption from taxation within the meaning of the constitutional inhibitions, but a substitution of one form of taxation for another upon the terms and conditions named. The equipment and machinery referred to is confined to that used in the actual operation of producing wells, hence, does not include equipment and machinery on hand, and not so used. By the act a tax is levied based upon the value of the gross production. This can only arise through the discovery and production of oil or gas. The equipment and machinery owned by the producer, and which is an indispensable agency in the discovery and production of the commodity, forms a part of the property out of which

> the production arises. Without it production is impossible. The same is not taxed directly, neither are the lands or leases, where the production is through a lessee."

Likewise, in In re: Skelton Lead & Zin Co.'s Gross production tax, 81 Okla. 134, 197 P. 495, this Court said:

> "The same section provides also that 'the payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, county, cities, towns, townships, and school districts and other municipalities . . upon the machinery, appliances, and equipments used in and around any well . . . and also upon the oil, gas, asphalt, or ores, . . during the year in which same is produced.'
>
> "Thus it appears that the sole object of the Legislature was to adopt a practicable means for ascertaining the fair cash value of these smelting plants and equipment 'as going concerns,' and to levy a 'property tax' thereon according to such value, and deeming the gross value of the products therefrom a fair and practical measure for ascertaining such value, it adopted such measure and levied a tax which it specifically provided should be in full and in lieu of all other taxes, and which should be no greater nor less than the general ad valorem rate of 'property tax', upon other property within the state, assessed at its fair cash value."

Thus it appears that the gross production tax is a property tax assessed upon producers of minerals as going concerns and based upon three per cent of the gross proceeds after and when the subject of the tax is produced. Likewise, everything incident to the lessee's production is taxed on a basis of three per cent of the oil and gas produced and everything incident to the lessor's royalty rights in the production is assessed upon a three percent basis of his share of the oil and gas so reduced to possession.

We find no discrimination between the lessor and the lessee for each is assessed in the same manner and there is

no denial to the one or the other of equal protestion of the law and no violation of the Fourteenth Amendment to the Constitution of the United States.

The Wolverine case, *supra*, dealt with the contention that the gross production tax was in violation of the Fourteenth Amendment to the Constitution of the United States, and came to a conclusion adverse to appellants by concluding that no right vouchsafed by the Federal Constitution had been denied or in anywise impaired by the provisions of the statute under consideration. See also: Protest of Bendelari, 82 Okla. 97, 198 Pac. 606.

We, therefore, conclude that this Court has heretofore determined that the Act under consideration is not in violation of the uniformity clause or the tax exemption clause of the Constitution of Oklahoma, as well as not being in violation of the Fourteenth Amendment to the Constitution of the United States.

Appellants rely upon: Thomas v. Gay, 42 L. Ed. 740; Gillespie v. State of Oklahoma, 66 L. Ed. 338; Jaybird v. Weir, 271 U. S. 609, 70 L. Ed. 1112; Indian Territory Illuminating Oil Co., v. Oklahoma, 240 U. S. 522, 60 L. Ed. 779; Choctaw O & G. R. Co., v. Harrison, 235 U. S. 292, 59 L. Ed. 234.

In each of these cited cases the minerals produced and sought to be taxed were produced from restricted Indian lands under departmental leases, whereas in the instant case the plaintiffs in error were at all times free to lease their land without governmental supervision by reason of the Act of Congress, May 27, 1908.

In Choctaw O. & G. R. Co., v. Harrison, *supra*, the gross production tax levied was upon mines of the Choctaws and Chickasaws, and upon segregated and unallotted lands, and wherein it was provided that the royalty was to be paid into the United States Treasury for educational purposes. The mines were under the supervision of trustees appointed by the president and subject to rules prescribed by the Secretary of the Interior. The lease there considered required

the approval of the Secretary of the Interior and so it was there held that the tax sought to be collected was one upon a federal instrumentality.

In the Gillespie case, *supra*, it was sought to collect a tax on a net income derived from leases of restricted Creek and Osage Indians lands, and the leases there considered were departmental leases.

In the Jaybird case, *supra*, it was sought to impose an ad valorem tax upon ore in the bin, though the ore having been produced from the patented allotment of a Quapaw Indian, which allotment was restricted from alienation until 1946. The lease there considered under which the ore was produced was executed under the Act of Congress of June 7, 1897, providing for direction and approval by the Secretary of the Interior, and a departmental lease was involved. And so with all of the cases cited.

The cases are not applicable to matter at bar for here no federal instrumentality is involved. Apparently no agency of the federal government is exercising supervision over the property in question, and, therefore, we conclude that the tax in question is not a tax upon a federal instrumentality. It is not even contended here that any federal instrumentality is involved, and there is an entire absence of any governmental supervision of appellants' land. Consequently, we affirm the judgment of the lower court in sustaining the demurrer of the defendant in error to the petition of the plaintiffs below.

Branson, C. J., Mason, V. C. J., Lester, Hunt, Clark, Hefner, J. J.—Concur.

Service of the within petition for rehearing and acknowledgment of a receipt of a copy thereof is hereby accepted this 27th day of Sept, 1928.

V. P. Crowe.
Asst. Atty. Genl.

In the Supreme Court of the State of Oklahoma.

Filed in Supreme Court of Oklahoma, Sept. 27, 1928
Jessie E. Moore. Clerk.

T. L. Carpenter and Lillie V. Carpenter,
Plaintiffs in Error,

vs.

A. S. J. Shaw, State Auditor of the State of Oklahoma,
Defendant in Error.

No. 19,122

PETITION FOR REHEARING.

Now come T. L. Carpenter and Lillie V. Carpenter, plaintiffs in Error, and respectfully represent and show to this honorable Court that on the 18th day of September, 1928, a judgment and decision was rendered by this Court in the above styled and numbered cause, affirming the judgment rendered in said cause by the District Court of Oklahoma County, Oklahoma, in said action, which sustained the demurrer of the defendant in error to the amended petition filed in said cause by plaintiffs in error; but plaintiffs in error respectfully represent and show to this honorable Court that there was error in said judgment and decision of this Court in the following particulars, to-wit:

(1) Said judgment and decision overlooked a question decisive of the case and duly submitted by counsel, namely, that Section 9814, C. O. S. 1921, commonly known as the Gross Production Tax Statute, as construed by this Court does not levy a tax upon the minerals after severance, as personal property, but upon other valuable property rights, which includes, when applied to the royalty owner, his mineral rights attached to and inherent in the land; or in other words, his interest in the minerals stored in the land.

(2) That said decision overlooked a further decisive question in the case duly submitted by counsel, that the sale of royalties accruing to plaintiffs in error under the con-

ditions alleged in their amended petition filed in this case is but a conversion of an interest in the fee into cash, and that the tax complained of is in fact a tax on the proceeds of the sale of an interest in the fee from which said mineral royalties are produced.

(3) That said decision is in conflict with a controlling decision of this Court, duly submitted by counsel, but which appears to have been overlooked by the Court in its opinion in this case, to-wit, the holding of this Court in the case of In Re Skelton Lead & Zinc Company's Gross Production Tax for 1919, 81 Okl. 134, 197 Pac. 495, where it is said:

> "In deciding this question, we bear in mind that *the tax in question is not levied upon the mine products themselves, but as we interpret the statute, is levied upon the entire property, mills, plants, machinery, equipment, etc., 'as a going concern,' the value of which as a going concern and the reasonableness of the rate upon which is to be ascertained by the gross value of the products.*"

(4) Said decision is in conflict with a controlling decision of the Supreme Court of the United States, to-wit, the case of Choate vs. Trapp, 224 U. S. 665, 56 L. Ed. 941, which holds that a liberal rule of construction should be applied to the class of persons to which plaintiffs in error belong, with regard to the exemption of their allotments from taxation, rather than a strict rule of construction as applied by the Court in its decision in this case.

(5) Said decision is in conflict with a further controlling decision of the Supreme Court of the United States, namely, the case of Pollock vs. Farmers' Loan & Trust Company, 157, U. S. 429, 39 L. Ed. 759, where it is held that a tax on the income is a tax upon the land from which the income is produced.

(6) That the provisions of Section 9814 C. O. S. 1921, which are construed and sustained by said decision as to the right to tax plaintiffs in error's allotments and the mineral royalties accruing therefrom, in the manner alleged in

the amended petition filed in this case, are, as thus construed, rendered violative of and in conflict with the provisions of the Atoka Agreement of April 23rd, 1897, adopted June 28th, 1898, and ratified August 24th, 1898, (30 Statute at Large 495, Chap. 517) under which plaintiff in errors' lands were allotted and patented to them in severalty; and violative of the provisions of Sections 5 and 8 of Article 10 and of Section 5 of Article 5 of the Constitution of Oklahoma, and of the 5th and 14th Amendments to the Constitution of the United States.

(7) Said decision in so far as it holds that it was necessary to have paid the taxes demanded on royalties received during the year 1926, at the time and in the manner as provided by law, before recovery thereof could be had, is in conflict with the prior decision of this Court in the case of Kenoyer vs. Board of Equalization of Ottawa County, 264 Pac. 891, and the decision of the Supreme Court of the United States in the case of Ward vs. Board of County Commissioners of Love County, 253 U. S. 17, 64 L. Ed. 751.

WHEREFORE, plaintiffs in error pray that the aforesaid judgment and decision of this Court made and entered in this cause be vacated, set aside and held for naught, and that a re-hearing be granted in said cause by this honorable Court.

Stephen A. George,
Attorney for Plaintiffs in Error.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION TO REHEAR.

We have previously urged upon this Court our reasons for the invalidity of the tax sought to be enforced as against plaintiffs in error and their assignors, and have cited the cases from this and other courts upon which we rely for a recovery in this action, but we can not refrain from saying a few words in support of our petition to rehear, and to respectfully urge upon this Court that the decision in this case is in conflict with a prior controlling decision of this Court in the case of In Re Skelton Lead & Zinc Company's Gross Production Tax for 1919, 81 Okl. 134, 197 Pac. 495,

where this Court in a well reasoned, able opinion by Mr. Justice Harrison held that: "The tax in question is not levied upon the mined products themselves, but as we interpret the statute, is levied upon the entire property, mills, plants, machinery, equipment, etc., as a going concern, the value of which as a going concern and the reasonableness of the rate upon which is to be ascertained by the gross value of the products."

It is true that the Court was there dealing with the producer, while here we have the royalty owner involved, but we respectfully submit that the same rule should apply as to the royalty owner, and that the tax is levied upon and includes the value of the remaining minerals which are attached to and stored in the land. As previously pointed out, Section 9814, *supra,* divides the business of oil production into two classes, the producer and the royalty owner, and it is expressly provided in the statute that the gross production tax is in full and in lieu of all taxes for all purposes, "upon any property rights attached to or inherent in the right to said minerals * * * upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to the land * * * and also upon the oil, gas * * * during the tax year in which the same is produced * * * but any investment in the land other than that herein enumerated * * * shall be assessed and taxed as other property within the taxing district in which such property is situated at the time." The writer can not understand how anyone can escape the force of the above quoted language, taken from Section 9814, *supra,* and how anyone can arrive at any other conclusion than that said statute levies a tax, not upon the minerals only, after severance from the soil, as personal property, but upon the mineral rights inherent in the land as well. The statute further provides that any other interest in the land shall be subject to an advalorem tax, clearly indicating, to the writer's mind, that the legislature intended that the gross production tax should cover and include the increased value to the land on account of the discovery of oil or gas. Such was the express holding of this Court in the case of Kenoyer vs. Board of Equaliza-

tion of Ottawa County, *supra,* where it is said in the second paragraph of the syllabus, that:

> "Added value for taxation should not be given land because of actual or prospective minerals beneath surface, subject to gross production tax when extracted."

In other words, this Court has heretofore, when construing the statute as applied to others than Indian allottees of the class of plaintiffs in error, that the gross production tax levied by Section 9814, *supra,* covers and includes the added value to land on account of the discovery of oil and gas and that the value for advalorem purposes should not be increased by reason of the production of oil and gas therefrom. If therefore, a part of the tax is levied upon an interest in the land—and we most respectfully submit that the language of the statute itself and the prior decisions of this Court above referred to seem to establish that fact—then the entire tax must fail and the State is without power to enforce any portion of the same, even should we concede—which we do not—that the state could levy a tax upon the minerals immediately upon severance. The following authorities establish that where a portion of a specific levy is illegal, the whole tax must fail, where the legal portion can not be separated from the illegal portion of the tax; People ex rel. Sanders v. Cairo, V. & C. R. Co., 249 Ill. 97, 94 N. E. 11; Stetson vs. Kempton, 13 Mass. 272, 7 Am. Dec. 145; Hewitt v. White, 78 Mich. 117, 43 N. W. 1043; Choat v. Phelps, 63 Kan. 762, 66 Pac. 1002.

We again urge upon the Court and most respectfully submit that to hold that the gross production tax as applied to the class of persons to whom plaintiffs in error belong is levied upon their minerals after severance violates the provisions of Sections 5 and 8 of Article 10, and of Section 5 of Article 5 of the Constitution of the State of Oklahoma, and the 5th and 14th Amendments of the Constitution of the United States, for the reason that said tax when applied to others covers and includes a tax upon other valuable property rights, and which are in fact of far greater value than the minerals themselves, which have been produced.

We therefore, respectfully urge the Court to give earnest consideration to what we have said above in connection with the arguments advanced in the briefs previously filed in this case, and that a rehearing be granted in this cause.

Most respectfully submitted,

Stephen A. George,
Attorney for Plaintiffs in Error.

Supreme Court; December Term, 1928, December 18th, 1928, Second Judicial Day.

United State of America,
State of Oklahoma, ss.

BE IT REMEMBERED, that on this Dec 18 1928, Supreme Court convened pursuant to adjournment of Dec 11 1928.

Present: F. P. Branson, Chief Justice, C. W. Mason, A. C. Hunt, R. A. Hefner, J. W. Clark, F. Riley, J. I. Phelps, and J. B. Harrison, Associate Justices, Jessie E. Moore, Clerk and S. S. Brooks, Marshal.

Public proclamation of the opening of court having been made for the transaction of such business as might properly come before it, the following proceedings were had, to-wit:

19,122 Carpenter et al. vs. Shaw, etc.

And now on this day it is ordered by the court that the petition for rehearing filed in the above cause be, and the same is hereby denied.

Filed in Supreme Court of Oklahoma Feb 9 1929. Jessie E. Moore, Clerk.

In the Supreme Court of the United States.
T. L. Carpenter, and Lillie V. Carpenter,
Petitioners,

vs.

A. S. J. Shaw, State Auditor of the
State of Oklahoma,
Respondent.

No. 19,122

File No.----------

STIPULATION OF PORTIONS OF RECORD TO BE PRINTED.

The parties hereto hereby designate for printing under the supervision of the Clerk the following portions of the record to present the questions involved, a complete transcript of which is being prepared for filing herewith:

(1) Amended petition of plaintiffs.
(2) Demurrer to amended petition.
(3) Order and judgment of District Court of Oklahoma County, sustaining said demurrer.
(4) Opinion of the Supreme Court of the State of Oklahoma.
(5) Petition for rehearing and order denying the same, which was entered on the 18th day of December, 1928.
(6) Refer to bond.
(7) Stipulation of portions of record to be presented.

It is further stipulated and agreed by and between the parties hereto that the foregoing designation of the portions of the record to be printed is adequate and sufficient for presentation of the questions involved herein.

Stephen A. George
Attorneys for Petitioners.

Edwin Dabney
Attorney General of the State of Oklahoma.

By V. P. Crowe
Assistant Attorney General.

Filed in Supreme Court of Oklahoma, Feb 9 1929. Jessie E. Moore, Clerk.

In the Supreme Court of the State of Oklahoma.

T. L. Carpenter and Lillie V. Carpenter,
Plaintiffs in Error,
vs.
A. S. J. Shaw, State Auditor of the
State of Oklahoma,
Defendant in Error.
No. 19,122

BOND ON APPEAL.

Know All Men By These Presents:

That, we, T. L. Carpenter and Lillie V. Carpenter, as principals, and the undersigned sureties are held and firmly bound unto A. S. J. Shaw, as State Auditor of the State of Oklahoma, in the penal sum of $200.00, good and lawful money of the United States, for the payment of which we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators firmly by these presents. *Sealed* with our seals, and dated this the 4 day of February, 1929.

Whereas, the above named principals intend to file a petition for writ of certiorari in the Supreme Court of the United States to review the judgment of the Supreme Court of the State of Oklahoma in the above styled and numbered cause:

Now, therefore, the condition of this obligation is such that if the above named principals shall prosecute their said appeal to effect and answer all costs, if they fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

T. L. Carpenter
Lillie V. Carpenter
Principals
Roy L. Zachary
Mattie L. V. Zachary
Sureties

JUSTIFICATION.

State of Oklahoma,
County of Stephens—ss:

Roy L. Zachary and Mattie L. V. Zachary, of lawful age, being duly sworn, depose and state that they are resident freeholders of Stephens County, Oklahoma, and that they are each worth the sum of $1,000.00 over and above their just debts and exemptions.

Roy L. Zachary
Mattie L. V. Zachary

Subscribed and sworn to before me this the 4th day of February, 1929.

Viola Malone
Notary Public.

(Seal)

My Commission Expires: July 11/31

The Above and foregoing bond is examined and approved by me this the 9th day of February, 1929.

Charles W. Mason
Chief Justice

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 15, 1929

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7398)

FILE COPY

MAR 1
CHARLES ELM

SUPREME COURT OF THE UNITED STATES

---------- TERM

No. ~~766~~ 50

T. L. CARPENTER AND LILLIE V. CARPENTER,
PETITIONERS,

vs.

A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

J. B. MOORE,
STEPHEN A. GEORGE,
Counsel for Petitioners.

( )

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SUPREME COURT OF THE UNITED STATES

---------- TERM

No.----------

T. L. CARPENTER AND LILLIE V. CARPENTER,
PETITIONERS,

vs.

A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

To the Honorable The Supreme Court of The United States:

Your petitioners, T. L. Carpenter and Lillie V. Carpenter, respectfully pray for a writ of *certiorari* to the Supreme Court of the State of Oklahoma, to reverse a judgment rendered by it on the 18th day of December, 1928 (R. 53, Print 56), which affirmed a judgment of the District Court of Oklahoma County, theretofore rendered against your petitioners, and in support thereof, respectfully represent and show:

STATEMENT OF THE CASE

Your petitioners, T. L. Carpenter and Lillie V. Carpenter (husband and wife), and their assignors, Mattie L. V. Zachary, *nee* Morris, and Julia A. Morris, are each members of the Choctaw Nation or Tribe of Indians; the said T. L. Carpenter being duly enrolled as an intermarried citizen of said Nation or Tribe of Indians, the said Lillie V. Carpenter being enrolled as one-sixteenth Choctaw blood, the said Mattie L. V. Zachary, *nee* Morris, being enrolled as one-sixty-fourth Choctaw blood and the said Julia A. Morris being enrolled as one-thirty-second Choctaw blood. That as such Choctaw Indians, there were alloted and patented, in severalty, to these petitioners and their assignors, above named, certain lands situated in Carter County, State of Oklahoma, as their portion of the allotable lands of the Chickasaw and Choctaw Tribes or Nations of Indians, which lands are described in the record. That patent covering that portion of the lands involved in this action belonging to the petitioner, T. L. Carpenter, was issued to him on February 27th, 1907; patent covering that portion of the lands belonging to Lillie V. Carpenter, involved in this action, was issued to her on October 10th, 1906; patent covering that portion of the lands belonging to the said Mattie L. V. Zachary, *nee* Morris, was issued to her on December 5th, 1908; and patent covering that portion of the land involved in this action belonging to the said Julia A. Morris was issued to her on October 10th, 1906.

That by the terms of the Act of Congress of May 27th, 1908 (35 Statute at Large, 312, Chapter 199), all restrictions against the alienation of said lands by said allottees, were removed, except that of minority as to the said Mattie L. V. Zachary, *nee* Morris, who was then a minor; and thereafter, said allottees duly leased their allotments to various persons, firms and corporations, named in the record, who thereafter found and produced oil and gas therefrom in paying quantities. That each of said leases reserved unto the lessors, the allottees of said lands, respectively, a royalty of one-eighth of all oil and gas produced and saved from

said premises by said lessees, respectively, and that during all times involved in this action said lessees were engaged in the operation of said leases and the production of oil and gas therefrom, and were during all of such times and have ever since been, and now are, paying royalties thereon to your petitioners and their assignors, under the terms and provisions of said leases.

Your petitioners further show to this Honorable Court that the Legislature of Oklahoma, in 1916, passed an act, commonly known as the Gross Production Tax Statute of said State, being Section 9814, Compiled Oklahoma Statutes, 1921, and providing among other things, for the payment of a tax of three *per centum* of the gross value of all oil and gas produced within said State; the payment of said taxes to be made quarterly for the periods ending March 31st, June 30th, September 30th and December 31st, of each year. Said Act provides that same shall apply both to the lessee, or producer, and the royalty or fee owner, except as to such royalty interests of the State of Oklahoma and royalty interests as are exempt from taxation under the laws of the United States; and it is further provided that:

> "The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the State, counties, cities, towns, townships, upon, school districts and other municipalities, *any property rights attached to or inherent in the right to said minerals,* upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas, *upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land,* upon the machinery, appliances and equipment used in and around any well producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, min-

erals or property hereinbefore in this paragraph mentioned or described."

Under and in pursuance of the aforesaid statute (Section 9814 C. O. S., 1921), the respondent herein, as State Auditor, demanded of these petitioners and their assignors the payment to him of a tax computed upon the basis of three *per centum* of the gross value of, and as a tax upon their *pro rata* share of all oil and gas produced from their allotments respectively; and threatened to issue an order to the lessees or purchaser of said oil and gas to withhold from the petitioners and their assignors, respectively, a sufficient part of their royalties to pay the tax demanded by him, claiming as his authority therefor, an Act of the Legislature of the State of Oklahoma, passed in 1925, which became effective April 7th, 1925, and which reads in part as follows:

> "The purchaser of all oil, gas or other minerals as hereinbefore referred to, shall recognize the State Auditor's order to withhold payment for all production wherein the gross production tax and penalty are unpaid, until such tax and penalty are paid, and on failure of the producer or royalty owner to pay such tax and penalty, the purchaser of such production shall, on order of the State Auditor, pay such tax and penalty, and his receipt therefor shall be accepted by such producer or royalty owner in lieu of cash in settlement for such production."

Thereafter, and on or about the 30th day of April, 1927, the petitioners and their assignors paid to the respondent herein as State Auditor of the State of Oklahoma, the amount of taxes demanded by him from the petitioners and their assignors upon the royalties received by them during the year 1926, and, the first quarter ending March 31st, 1927; and at the time of the payment thereof, said parties served a written notice of protest upon the respondent that said taxes were illegally and wrongfully demanded of them, and that the same were being paid under protest, and that suit would be instituted against him within thirty days thereafter for the recovery of said taxes; as provided by

the terms of Section 9973, C. O. S., 1921. The claims of the said Mattie L. V. Zachary, *nee* Morris, and Julia A. Morris, having been assigned to the petitioners herein, said petitioners commenced an action against the respondent as State Auditor in the District Court of Oklahoma County, within the time and manner as provided by Section 9971, C. O. S., 1921, *supra*, for the recovery of the aforesaid taxes (R. 5, Print 1).

The respondent filed a demurrer to the amended petition filed in said trial Court, which demurrer was sustained by said Court (R. 25-26, Print 24), and the petitioners then appealed to the Supreme Court of the State of Oklahoma, where the judgment of the trial Court was affirmed and the following principles of law were announced in the Syllabus, to-wit:

> "By Section 9971, C. O. S., 1921, the right to maintain an action for the recovery of an illegal tax is conditioned on compliance with all requirements therein contained, one of which is that the amount of taxes assessed shall be paid at the time and in the manner provided by law. Where a petition on its face shows that there has been no compliance with one of the essential requisites, it fails to state a cause of action.
>
> "Oil when discovered and reduced to possession by being detached from the soil in which it is embedded becomes and is personal property and is subject to state gross production tax.
>
> "By the provisions of the Act of Congress of June 28, 1898, 30 Stats. 495, known as the Atoka Agreement, the allotments of Choctaw and Chickasaw Indians were made to be exempt from taxes so long as title remained in the original allottees, not exceeding 21 years from the date of patent, but said exemption from taxation did not extend to personal property.
>
> "By Act of Congress, May 27, 1908, 35 Stats. 312, restriction from alienation was removed from all lands of allottees of the Five Civilized Tribes enrolled as intermarried whites, freemen, and mixed-blood Indians

having less than one-half Indian blood, including minors, and in consequence thereof appellants were at liberty to execute oil and gas leases to their lands without interference or regulation on the part of a federal government agency. Held oil produced under a royalty interest is subject to the gross production tax of the State of Oklahoma, notwithstanding that the land upon which the oil was produced is exempt from taxation.

"Oil discovered and reduced to possession is a personal property and is not exempt from State taxation by the Constitution of the State of Oklahoma.

"The property upon which the tax in question was levied is not exempt from State taxation by the Constitution of the United States, or by an Act of Congress, or treaty with the Indians.

"The gross production tax of the State of Oklahoma, as levied under the facts in the instant case, is not a tax upon a federal instrumentality" (R. 31, Print 27-29).

Petition to rehear was filed in due time, which was overruled and denied by the Supreme Court on December 18th, 1928 (R. 53, Print 56), and your petitioners now seek to bring the matter before this Court for a writ of *certiorari*, to review the action of the Supreme Court of the State of Oklahoma, on account of the errors of said Court, as hereinafter set out.

STATEMENT OF THE ISSUES

Section 29 of the Act of Congress of June 28, 1898 (30 Statute at Large, 505, Chapter 517), commonly known as the Atoka Agreement, under which the lands involved in this action were allotted to the petitioners and their assignors in severalty, provides that:

> "All the lands allotted shall be non-taxable while the title remains in the original allottee, but not to exceed twenty-one years from the date of patent."

The petitioners pleaded that pursuant to the provisions

of the statute just quoted, and the Constitution and laws of the State of Oklahoma, their several allotments and the issues, rents, revenues, royalties and proceeds arising therefrom, including said royalty oil and gas, were exempt to them, and not subject to taxation in any manner or for any purpose, as long as title to said lands remained in them, respectively, for a period of twenty-one years from the date of the issuance of patents, respectively; that such periods had not expired and that petitioners and their assignors had not parted with their title to their respective allotments; and that under the terms of the gross production statute of the State of Oklahoma, as construed by the Supreme Court of said State, said tax was not a tax upon the minerals after severance from the soil, but a property tax, the equivalent of an *ad valorem* tax, and in full and in lieu of all taxes by the State, counties, cities, towns, townships and school districts, upon the minerals produced and the land from which the same was produced during the taxable year; and that therefore, said taxes were wrongfully and illegally exacted from the petitioners and their assignors; the contention of petitioners being that the royalties involved were not taxable, inasmuch as the same were produced from their allotted lands which were not taxable under the provisions of the Federal Statute above referred to.

Choate vs. *Trapp*, 224 U. S. 665, 56 L. Ed. 941;
Pollock vs. *Farmers Loan & Trust Co.*, 157 U. S. 429, 39 L. Ed. 759;
Thomas vs. *Gay*, 169 U. S. 264, 42 L. Ed. 740;
Gillespie vs. *State of Okla.*, 257 U. S. 501, 66 L. Ed. 338;
Jaybird Mining Co. vs. *Weir*, 46 Sup. Ct. Rep. 582;
Colonial Trust Co. vs. *Lewellyn*, 12 Fed. (2nd) 481.

There are two points decided in this case by the State Court: First, that the royalties involved in this action are taxable under the gross production statute, *supra;* and second, that only such portions of the tax protested as was paid at the time and in the manner as provided by Section 9971, C. O. S., 1921, could be recovered, even though the gross pro-

duction statute should be held not to apply to the royalties involved in this action.

We shall consider these in the order above stated, because, if it be held by this Court that the royalties involved are in fact taxable under the gross production tax statute of Oklahoma, then it will be unnecessary for the Court to examine the decision of the Oklahoma Supreme Court for error upon the question of the time of payment.

POINT ONE

It is the contention of the petitioners that said royalties represent the proceeds of the sale of a part of the *corpus* of their allotted lands. *Lake Superior Consolidated Iron Mines, et al.*, vs. *Lord*, 271 U. S. 577, 70 L. Ed. 1093; *Gabe E. Parker* vs. *Tootie Riley*, 63 L. Ed. 847; *State* vs. *Snyder*, (Wyo.) 212 Pac. 758; *State of Texas* vs. *Hatcher*, (Tex.) 287 S. W. 192; *Opinions from Attorney General*, Vol. 19, Page 161; *Barnes* v. *Keys*, (Okla.) 127 Pac. 261, 37 Okla. 6; *Rick* vs. *Donneghey*, 71 Okla. 204, 177 Pac. 86; *Strawn* vs. *Brady*, 84 Okla. 66, 202 Pac. 505; *Wilson, et al.*, vs. *Hughes, et al.*, (W. Va.) 28 S. E. 781.

Further, even should said royalties be considered as ordinary rents and produce, nevertheless, they are not taxable, because a tax upon the same is a tax upon the land from which they were produced. *Thomas* vs. *Gay*, 42 L. Ed. 740; *Gillespie* vs. *State of Oklahoma, supra; Indian Territory Illuminating Oil Co.* vs. *State of Oklahoma*, 240 U. S. 522, 60 L. Ed. 779; *Choctaw O. G. R. Co.* vs. *Harrison*, 235 U. S. 292, 29 L. Ed. 234; *Pollock* vs. *Farmers Loan & Trust Co., supra.*

It is the further contention of the petitioners that if it be held that said tax is levied upon the minerals after severance, as personal property, wholly separate and distinct from the land, then such tax is not uniform, as required by the Oklahoma Constitution, Section 5, Article 10, for the reason that said tax, when applied to others of the same class, covers and includes other valuable property rights

which are taxable under the State law; and also violates the 5th and 14th Amendments to the Constitution of the United States. *Sioux City Bridge Co.* vs. *Dakota County, Neb.*, 67 L. Ed. 340.

POINT TWO

While the headnotes quoted above from the opinion of the Supreme Court of Oklahoma in this case do not disclose the fact, nevertheless, that opinion holds that all that portion of said taxes which were not paid before delinquency could not be recovered, even though plaintiffs should recover the portion which was paid before becoming delinquent. Section 9814, C. O. S., 1921, provides that said gross production tax shall be paid within thirty days from the date the same becomes due, and if not paid within such time, said taxes become delinquent and bears eighteen per cent. penalty thereafter. The State Court holds that the taxes paid for the year 1926 were delinquent at the time of payment, and that plaintiffs cannot recover such taxes for that reason, if for no other. Such holding, of course, would not apply to that portion of taxes paid for the first quarter of 1927, for the reason that the same were paid at the time and in the manner as provided by the Oklahoma Statute, and before delinquency.

It is the petitioners' contention on this feature of the case that the State is without jurisdiction to levy the tax on the royalties accruing to the petitioners and their assignors, and that such tax is void as to them; and that the rule applied by the State Court is therefore in conflict with *Ward* vs. *Love County*, 253 U. S. 17, 64 L. Ed. 751.

WHEREFORE, petitioners pray that writ of *certiorari* may issue out of and under the seal of this Court, directed to the Supreme Court of the State of Oklahoma, requiring it to certify the case to this Court and reverse their determination, as provided by the Judicial Code of the United States, and amendments thereto, or that your petitioners may have such other or further relief or remedy in the premises as this Court may deem appropriate and in con-

formity with the provisions of said Judicial Code, and that the said judgment of the Supreme Court of the State of Oklahoma, and every part thereof, may be reversed by this Honorable Court.

J. B. Moore,
Stephen A. George,
Counsel for Petitioners.

FILED
MAY 23 1929
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

NO. 756

T. L. CARPENTER and LILLIE V. CARPENTER,
PETITIONERS

vs.

A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, RESPONDENT

BRIEF OF PETITIONERS

STEPHEN A. GEORGE,
J. B. MOORE,
Counsel for Petitioners.

( )

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(a) The statute as applied to royalty owners, levies a tax directly upon an interest in the land, and not upon the minerals after severance 8

(b) The tax is illegal even if considered as a tax upon the yield or produce of the land, whether (1) said mineral royalties are attempted to be taxed as such; or (2) whether they be considered as ordinary rents and produce of said lands; for it is in either event, a tax upon the land 16

(c) The tax, if enforced against petitioners and their assignors, would deny to them the uniformity of operation of the tax laws of the State of Oklahoma, and would deny to them the equal protection of the law 23

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

NO. 766

T. L. CARPENTER and LILLIE V. CARPENTER,
PETITIONERS

vs.

A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, RESPONDENT

BRIEF OF PETITIONERS

Opinion Below, 272 Pac. 393

JURISDICTION

This Court granted Application for Writ of Certiorari on the 15th day of April, 1929.

QUESTIONS PRESENTED

PART 1

The petitioners, T. L. Carpenter and Lillie V. Carpenter, and their assignors, Mattie L. V. Zachary, nee Morris, and Julia A. Morris, are duly enrolled Choctaw Indians of less than one-half blood, and each received an allotment of lands in the State of Oklahoma by virtue of their citizenship in said tribe of Indians. The period of twenty-one years from the date of the issuance of patents, respectively, had

not expired as to any of said allotments at the time of filing this suit, and has not yet expired as to some of them. The allottees still retain title to their respective allotments, from which restrictions have been removed by Act of Congress of May 27th, 1908, 35 Statute 312. By virtue of the statutes and decisions hereinafter set forth such lands are and were non-taxable so long as the title remained in the allottee, not to exceed twenty-one years from the date of the issuance of patents, respectively. Subsequent to the removal of restrictions, said allottees leased their several allotments to various persons and corporations for oil and gas purposes in the usual manner and form, whereby they retained a one-eighth royalty of the oil and gas produced from their several allotments. In 1915, the State of Oklahoma enacted what is commonly known as a gross production tax statute, which was amended in 1916, which levies a tax of three percentum upon the royalty interests of all royalty owners coming within the provisions of the act, which tax is payable quarterly each year; and it is contended by the State Auditor that the petitioners' royalty interests are subject to the payment of said tax. In pursuance of the leases aforesaid, the respective lessees entered upon said lands and developed the same for oil and gas purposes, and are now and were at all times mentioned in the petition filed in this case producing oil and gas therefrom in paying quantities; one-eighth part of which is and was payable to the petitioners and their assignors respectively as a royalty. The State Auditor demanded of petitioners and their assignors the payment of said gross production tax upon their royalty interests, and in order to avoid the issuance of tax warrants, or the stopping of the payment of royalties to them, as authorized by the Oklahoma statute, said parties paid the amount of tax demanded of them to the State Auditor and then commenced an action against him in the District Court of Oklahoma County to recover said tax; upon the ground that the same was illegal and uninforcible as against their royalty interests. The State Auditor demurred to the petition, which was sustained by the trial

court, whereupon an appeal was taken to the Supreme Court of the State by the petitioners, where the judgment of the trial court was affirmed; and the State Supreme Court held, first, that said royalty interests were subject to the payment of said tax, and second, that in no event could the petitioners recover that portion of the tax which was not paid before delinquency. The petitioners contend that the royalty interests involved are not subject to the payment of a gross production tax during the period alleged in the petition, for the reason that the lands involved are exempt from taxation. The petitioners further contend that said tax as applied to their royalty interests during the time involved is utterly void and that the state was powerless to enforce the same and that the provisions of the statute requiring the payment of the tax before delinquency, in order to recover is not applicable in this case.

PART 2

As to the merits of the controversy, the petitioners contend that, inasmuch as the lands involved were admittedly non-taxable during the period involved, that the respective royalty interests are also non-taxable for the reason that a tax upon such royalty interests is in fact a tax upon the land; that the statute by its express provision, and as construed by the Oklahoma Supreme Court, levies a tax upon the mineral rights incident to and inherent in the land, rather than a tax upon the oil after severance; and further, that even should the statute be held to levy a tax upon such minerals after severance, still such tax is invalid and unforcible as to said royalty interests, on the theory that where the principal is immune from taxation, the produce and yields derived therefrom are likewise immune and exempt. The State Auditor contends, that said royalty interests are subject to taxation under said gross production tax statute.

STATUTES

(See Appendix.)

STATEMENT OF THE CASE

As previously stated, petitioners and their assignors are members of the Choctaw Nation or Tribe of Indians, and as such, each received an allotment of lands in severalty, which are still owned by them. Under the provisions of Section 29 of the Act of Congress of June 28th, 1898, ratified August 24th, 1898, commonly known as the Atoka Agreement (30 Statute, 495), said lands were non-taxable as long as title remained in the original allottee, not exceeding twenty-one years from the date of the issuance of patent. Such period had not expired as to either of the allotments involved at the time of the institution of this action, and has not expired yet as to a portion of them. Said allottees leased their several allotments for oil and gas purposes, reserving unto themselves one-eighth of the oil and gas produced as a royalty, and in pursuance thereto, oil and gas have been and are now being produced and saved in paying quantities and the allottees have received and are now receiving the royalties reserved, as aforesaid.

The restrictions on the alienability of their lands having been removed by Act of Congress of May 27th, 1908, 35 Stat. 312, as each of the allottees are of less than one-half Indian blood, the State Auditor claimed the right to levy a tax of three percent of the gross value of the minerals produced upon said allottees' royalty interests. Thereupon, said allottees, in order to avoid the issuance of tax warrants, or the stopping of the payment of royalties accruing to them under order of the State Auditor, paid the taxes demanded under protest; and at the time of the payment served notice upon the State Auditor as required by the Oklahoma statute, that such taxes were being paid under protest and that suit would be instituted for the recovery thereof. This action was commenced within the time and in the manner as required by the Oklahoma statute in the District Court of Oklahoma County to recover said illegal taxes.

Petitioners allege that said royalty interests were exempt from taxation in view of the fact that their several

allotments were non-taxable, and that to attempt to tax such royalty interests was contrary to and in violation of the laws of the United States, as contained in the agreement between the United States and the Choctaw and Chickasaw Nations or Tribe of Indians. They further allege, that in the process of operating said leases and producing oil and gas from said lands that the one-eighth portion of said minerals belonging to the allottees were pumped immediately after the same were produced into the pipe lines and containers of the purchaser of such minerals, where the same were passed through meters to determine the amount of such royalty interest due to said allottees, and that the production and sale of such minerals in effect constituted one transaction.

Petitioners further allege, that as expressly provided by the terms of Section 9814 C. O. L. 1921, and as construed by the Supreme Court of the State of Oklahoma, said tax is not levied upon the minerals after severance from the soil, but is a property tax, the equivalent of an ad valorem tax and in full and in lieu of all taxes by the state, county, city, town, township and school district, upon the minerals produced during the year and upon the rights attached to or inherent in the right to said minerals appertaining to the land; and that said statute as construed by the taxing officials of the State of Oklahoma covers and includes, and is levied and assessed upon the value of the royalty in the remaining minerals which are stored in and under the ground, and that no higher value is placed by the taxing officials of said state for the purpose of general and ad valorem taxes upon lands highly productive of oil and gas than upon similar lands containing no such minerals.

Petitioners further allege, that to apply said tax as to the royalty interests of the several allottees involved in this action violates the uniformity clauses of the Oklahoma Constitution (Section 5 of Article 10, and Section 59 of Article 5), and constitutes the taking of their property without due process of law, and denies to them the equal protection of the law, in violation of the Oklahoma Consti-

tution and the 5th and 14th Amendments to the Constitution of the United States; for the reason that the tax, when applied to other tax payers of the same class whose lands were not exempt from taxation, covers and includes a tax upon the land itself and the minerals stored therein. (R. 1-23.)

The State Auditor filed a demurrer to plaintiffs' petition (R. 24), which was sustained by the trial court. (R. 26.) The petitioners appealed to the Supreme Court of the State, which affirmed the judgment of the trial court and the syllabus of the opinion is as follows:

> "By Section 9971, C. O. S. 1921, the right to maintain an action for the recovery of an illegal tax is conditioned on compliance with all requirements therein contained, one of which is that the amount of taxes assessed shall be paid at the time and in the manner provided by law. Where a petition on its face shows that there has been no compliance with one of the essential requisites, it fails to state a cause of action.
>
> "Oil, when discovered and reduced to possession by being detached from the soil in which it is embedded becomes and is personal property and is subject to state gross production tax.
>
> "By the provisions of the Act of Congress of June 28, 1898, 30 Stats. 495, known as the Atoka Agreement, the allotments of Choctaw and Chickasaw Indians were made to be exempt from taxes so long as title remained in the original allottees, not exceeding 21 years from the date of patent, but said exemption from taxation did not extend to personal property.
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> "By Act of Congress, May 27, 1908, 35 Stats. 312, restriction from alienation was removed from all lands of allottees of the Five Civilized Tribes enrolled as intermarried whites, freemen, and mixed-

blood Indians having less than one-half Indian blood, including minors, and in consequence thereof appellants were at liberty to execute oil and gas leases to their lands without interference or regulation on the part of a federal government agency. Held oil produced under a royalty interest is subject to the gross production tax of the State of Oklahoma, notwithstanding that the land upon which the oil was produced is exempt from taxation.

"Oil discovered and reduced to possession is personal property and is not exempt from state taxation by the Constitution of the State of Oklahoma.

"The property upon which the tax in question was levied is not exempt from state taxation by the Constitution of the United States, or by an Act of Congress, or treaty with the Indians.

"The gross production tax of the State of Oklahoma, as levied under the facts in the instant case, is not a tax upon a federal instrumentality." 272 Pac. 393. (R. 27-29.)

SUMMARY OF ARGUMENT

PART 1

The petitioners contend that since the several allotments involved were exempt from taxation during the period referred to in plaintiffs' petition that their royalty interests are likewise exempt from taxation; and that the tax now under consideration is a tax upon the land eo nominee, and that such tax is therefore clearly illegal. They further contend that even should it be held that the tax is not levied upon the land, or an interest therein as such, but rather upon the income and produce thereof that nevertheless such tax is illegal under the principle announced by this Court in the case of Pollock vs. Farmers' Loan & Trust Co., 157 U. S. 429, 39 L. Ed. 759, and other cases which will be

referred to, holding that a tax upon the produce or income is a tax upon the source of such income.

PART 2

The petitioners further contend that the holding of the Oklahoma Supreme Court, that they cannot recover that portion of the tax which was not paid before delinquency, for the reason that the same was not paid at the time and in the manner as provided by statute, is erroneous and that such rule is not applicable to the petitioners and their assignors for the reason that the tax is utterly void and the state is wholly without power or authority to enforce the same; and that the provisions of the Oklahoma statute requiring the payment before delinquency merely applies to a tax which the state has power to levy, but which may be recovered by virtue of some error or irregularity in the levy and assessment thereof.

ARGUMENT

PART 1

(a) The Statute as Applied to Royalty Owners, Levies a Tax Directly Upon an Interest in the Land, and not Upon the Minerals After Severance.

First, let us consider the state statute under which the tax is attempted to be enforced and the decisions of the Oklahoma Supreme Court, construing the same, to determine the nature of the tax and the property rights upon which the tax is laid.

Section 9814 C. O. L. 1921, after providing that those engaged in the mining or production of certain minerals, including petroleum or other crude oil and natural gas, shall be subject to a gross production tax, and providing for the time and method of the payment as well as the amount of the tax, further provides that:

"* * * * * The owner of any royalty interest shall

pay to the State Auditor the tax herein imposed upon such royalty interest within the time and in the manner provided by this act."

Also:

"The tax hereby declared shall also attach to and is levied on what is known as the royalty interest except such royalty interest of the State of Oklahoma or *such royalty interests as are exempted from taxation under the laws of the United States* and the amount of the tax on the royalty interest shall be a lien on such interest." (Italics ours.)

As to the property of the royalty owner covered by the tax, the statute provides:

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities, upon *any property rights attached to or inherent in the right to said minerals* * * * * *upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land* * * * * and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described." (Italics ours.)

The italicized portion of the statute above quoted clearly applies to the interest of the royalty owner, which is a freehold estate. The rights referred to are those pertaining to the land generally. The lessee has no such right, but has merely a privilege to go upon the land and to explore for, produce and save such minerals, with the right to use so much of the surface as is reasonably necessary for such purposes. In other words, his is more in the nature of an easement. Rich vs. Doneghey, 71 Okla. 204, 177 Pac. 86.

Then applying the above quoted portion of the statute

to the royalty owner, it is clear that the tax is levied upon the mineral rights appertaining to the lands, or his minerals stored therein. The State Auditor contends that the tax is laid wholly upon the minerals as personal property after severance. But if the words "upon any property rights attached to or inherent in the right to said minerals" and "upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land" mean anything, then this contention is untenable.

Our contention is that the statute under consideration levies a tax not only upon the product of the land—the land owners' share in the minerals produced during the tax year, if indeed the value of the minerals produced is to be taken into consideration for any purpose in computing the tax, other than for the purpose of determining the amount of the tax to be paid upon the value of the mineral rights incident to and inherent in the land—but by the clear and explicit terms of the statute itself, the tax covers and includes an interest in the land—the remaining minerals stored therein; which are alleged in the petition to be of far greater value than the oil actually produced and saved during the taxing year. In addition to the provisions above quoted, the statute further provides that:

> "* * * * *any interest in the land other than that herein enumerated, and oil in storage, asphalt, and ores bearing the minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time.*" (Italics ours.)

The reference "any other interest in the land other than that herein enumerated," clearly shows that the legislature intended that the payment of the gross production tax should cover and include the minerals stored in the lands, which are admittedly a part of the real estate until severed

from the soil; and the surface rights and all other rights other than the mineral rights in said lands are made subject to the payment of an ad valorem tax as though such lands had no value for oil and gas purposes.

Thus it appears that two classes of taxes are provided by this act; first, a gross production tax, computed upon the value of the minerals produced during the year, which is in lieu of an ad valorem tax, but nevertheless a direct tax, upon all of the property mentioned in the statute during the taxable year; and second, an ad valorem tax upon the surface rights of the land and all oil produced and on hand January 1st; the date which other property is declared taxable on that basis. Now suppose plaintiffs did not sell their oil as produced, and let us further suppose that there should be produced and placed in storage to their credit on the 31st day of December, 1000 barrels of oil. Under the State Auditor's theory, they would be compelled to pay a direct tax of 3 percent of the gross value of this oil for *one day* of the year, and then pay an ad valorem tax on the same oil by reason of its ownership the next day. The same inequality would apply, of course, in a lesser degree, depending upon the date of production back over the entire year. Certainly the legislature did not intend any such inequality.

It is alleged in plaintiffs' petition (the truth of which is admitted by the demurrer), that the taxing officials of the State of Oklahoma have uniformly construed said gross production tax statute ever since the date of its adoption, as a tax upon the value of the minerals stored in the land; and that no greater value is placed by them for purposes of general and ad valorem taxes upon lands known to be highly productive of oil and gas than upon lands of equal value for agricultural purposes, but entirely barren of all minerals and mineral substances. The Oklahoma Supreme Court recently held this to be the proper construction of the statute in the case of Kenoyer vs. Board of Equalization of Ottawa County, 130 Okla. 3, 264 Pac. 891, where the Court said that no additional valuation should be placed upon land for general ad valorem tax purposes by reason of the dis-

covery of oil, as the gross production tax covers the added value caused by the discovery of such mineral.

Also, in the case of In Re: Skelton Lead & Zinc Company's Gross Production Tax for 1919, 81 Okla. 134, 197 Pac 495, the State Court in constructing this statute held specifically that the tax is not laid upon the products of the mine. There it is said:

> "The provision in Chapter 39, Sess. Laws Ex. Sess. 1916, for the payment of a sum equal to 1½ per cent of the gross value of lead and zinc products, is merely a means of measure adopted by the legislature for ascertaining the fair cash value of the mills, plants, machinery, equipment, and other property used in the operation thereof, as a going concern."

Also:

> "In deciding this question, we bear in mind that *the tax in question is not levied upon the mine products themselves, but as we interpret the statute, is levied upon the entire property, mills, plants, machinery, equipment, etc., 'as a going concern,' the value of which as a going concern and the reasonableness of the rate upon which is to be ascertained by the gross value of the products.*" (Italics ours.)

> "Chapter 39, ss. 1, Session Laws Ex. Sess. 1916, provides that the mine operator shall make reports showing 'the kind of such mineral, oil or gas produced; the gross amount thereof produced, and the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable and whether it is claimed that such royalty is exempt from taxation by law, * * * * and shall at the same time pay to the State Auditor a tax (not upon the products themselves, but a tax) equal to one-half of 1 percentum of the gross value' of the mined products.

"The same section provides also that:

> "The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities * * * * upon the machinery, appliances and equipment used in and around any well * * * * and also upon the oil, gas, asphalt or ores * * * * during the tax year in which the same is produced.

"Thus it appears that the sole object of the legislature was to adopt a practicable means for ascertaining the fair cash value of these smelting plants and equipment 'as going concerns,' and to levy a property tax thereon according to such value, and, deeming the gross value of the products therefrom as a fair and practicable measure for ascertaining such value, it adopted such measure and levied a tax which it specifically provided should be 'in full and in lieu of all other taxes,' and which should be no greater nor less than the general ad valorem rate of property tax upon other property within the state, assessed at its fair cash value. And in order to attain this object and to provide adequate means for its attainment, the same act, Chapter 30, Session Laws Ex. Sess. 1916, p. 105, provides that:

> " 'The State Board of Equalization, upon its own initiative, may, and upon complain of any person who claims that he is taxed too great a rate hereunder, shall take testimony to determine whether the taxes herein imposed are greater, or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated, including the value of oil, gas, or mineral lease, or of the mining or mineral rights, the machinery, equipment or appliances used in the actual

> operation of, in and around any such well or mine, the value of the oil, gas, asphalt and other element of taxable value in lieu of which the tax herein is levied. The said board shall have power and it shall be its duty to raise or lower the rates herein imposed to conform thereto. An appeal may be had from the decision of the State Board of Equalization thereon, by any person aggrieved, to the Supreme Court, in like manner and with like effect as provided by law in other appeals from said board to said Court.'
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> "From this it is clear that the legislature had no other object than to levy a property tax upon mining property according to its fair cash value, using the measure therein adopted for ascertaining such value, and providing the means therein provided for correcting any mistakes which might result from over valuation or excessive rate. See *Exchange Oil Co.* vs. *State,* (No. 11355), 193 Pac. 999, not yet officially reported."

We therefore find that the statute as thus construed is not against the minerals actually produced during the tax year, but is upon the other property mentioned in the statute, *which in the case of the royalty owner is his royalty interest in the land;* and the tax of 3 percent of the gross value of the minerals produced is only adopted as a means of fixing the value and the amount of the tax which should be levied upon the royalty interest in the land.

The State of Minnesota has a gross production statute very similar to the Oklahoma statute, and this court in Lake Superior Consolidated Iron Mines, et al, vs. Lord, et al, 271 U. S. 577, 70 L. Ed. 1093, in construing the Minnesota statute held that the tax was levied upon the land. We quote from the opinion as follows:

> "By their several bills in the United States District Court, appellants alleged the invalidity of

Chapter 226, Laws of Minnesota, approved April 11, 1923, because of a conflict with the Fourteenth Amendment and the State Constitution. They sought to prevent its enforcement. That court held the enactment valid, and, by decrees entered January 15th, 1925, dismissed the bills. These appeals followed.

"The challenged act (fourteen sections) effective from its passage provides—

Sec. 1. There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore ore from land in this state, a tax of six (6) per cent.

Sec. 2. For all purposes of this Act the word 'royalty' shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state for permission to explore, mine, take out and remove ore therefrom; and the word 'person' shall be construed to include individuals, co-partnerships, associations, companies and corporations.

"Succeeding sections relate to reports to the Tax Commission, method of assessment, penalties, date of payment, etc. Section 5 provides: 'A person subletting land for the use of which he receives royalty shall be required to pay taxes only on the difference between the amount of royalty paid by him and the amount received.' And Section 8: "The *situs* of royalty for all purposes of this act shall be in this state; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore,

mine, take out and remove ore on which the royalty is paid.'

"And then speaking with reference to said enactment, the court continued:

> " 'Ultimate construction of Chapter 226 is for the state courts, but, in the absence of that, *we think the enactment may be reasonably interpreted as laying a tax upon interest in mineral lands* from which permission has been given to extract ores upon payment of royalty. The amount of the exaction is determined by reference to the sum actually received *for the use of such interests.*'

"As the tax is laid upon land, neither the owner's residence nor the place fixed for the payment of the royalty is important." (Italics ours.)

See also, State vs. Snyder, (Wyo.), 212 Pac. 578; State vs. Hatcher (Tex.), 281 S. W. 192; Opinions of Attorney General, Vol. 19, page 161; Barnes vs. Keyes, 37 Okla. 6, 127 Pac. 261.

In view of the plain provisions of the statute and the foregoing authorities, we earnestly insist that the tax now under consideration is a direct tax upon the land as such, and is therefore uninforcible as to the petitioners and their assignors; as it is admitted that their lands involved herein were exempt from taxation during the times alleged in their petition. The right to exemption was settled by this court in Choate vs. Trapp, 224 U. S. 665, 56 L. Ed. 941.

(b) The Tax is Illegal Even if Considered as a Tax Upon the Yield or Produce of the Land, Whether (1) Said Mineral Royalties are Attempted to Be Taxed as Such; or (2) Whether They Be Considered as Ordinary Rents and Produce of Said Lands; for it is in Either Event, a Tax Upon the Land.

We believe that all will agree that oil and gas royalties should not be classed as ordinary rents and produce, and that a different rule should apply as to these.

Oil in place is a part of the realty. Barnes vs. Keys, 37 Okla. 6, 127 Pac. 261; Rich vs. Doneghey, 71 Okla. 204, 177 Pac. 86; Strawn vs. Brady, 84 Oklahoma, 66, 202 Pac. 505. And as between the life tenant and the remainderman, the proceeds of the sale of oil and gas go to the remainderman. In Barnes vs. Keys, supra, it is said:

> " * * * * In other words, it is held that the minerals are part of the land itself and that the life tenant has no right to take the minerals any more than he would have the right to sell or dispose of a part of the surface of the land."

Further on in the course of the opinion, it is said:

> " * * * * and it follows that the proceeds of the oil belong to the remainderman, just as the proceeds of the land itself would."

The Supreme Court of West Virginia, in the case of Wilson, et al, vs. Hughes, et al, 28 S. E. 781, 30 L. R. A. 292, held that:

> "Petroleum oil, as it is found in the cavities of the rock, is part of the realty, and embraced in the comprehensive idea which the law attaches to the word 'land'. "

The Supreme Court of Texas, in the case of State of Texas vs. Hatcher, 281 S. W. 192, in an able opinion, holds that:

> 2. "An oil and gas lease is a sale of a portion of the corpus of the land and in the event oil is discovered and produced there is a final and permanent taking of a portion of the land, the stipulated royalty being the purchase price payable as in installments."

Also:

> " * * * * *it seems quite clear to us that the courts*

> *recognize a distinction between minerals and crops taken from annually or oftener. The former is a permanent taking of the corpus of the property. The latter does not in any sense permanently deplete the value of the land."* (Italics ours.)

The Oklahoma Supreme Court in the case of Aldridge vs. Houston Oil Company, et al, 116 Okla. 281, 244 Pac. 782, recognizes the distinction between oil and gas royalties and ordinary produce in the following language:

> " * * * * When production is reached, the fee is impaired and diminished to the extent of the value of the oil or gas which is brought to the surface and reduced to possession. This would not be income, but a conversion of the fee pro tanto, or, as expressed at common law, waste, which is a right prohibited to a life tenant. Rapel vs. Ohio Oil Co., 95 N. E. 225, 176 Ind. 4, Ann. Cas. 1913E, 836; Marshall vs. Mellon, 36 Am. St. Rep. 601; Williamson vs. Jones, 27 S. E. 411, 43 W. Va. 562, 38 L. R. A. 694, 64 Am. St. Rep. 891."

In the case of Gabe E. Parker vs. Tootie Riley, 63 L. Ed. 847, this court, in dealing with the question as to whether oil royalties produced from the homestead of a full-blood Indian who left surviving, a child, born prior to March 4th, 1906, and also one born after that date, should be considered as ordinary rents and income accruing from said land and therefore payable to the heir born subsequent to said last mentioned date, held that the royalties thus received were a part of the real estate and that they therefore belonged to the remainderman, and that the child born after March 4th, 1906, who, under the federal statute, was entitled to the exclusive use and benefit of the homestead, was only entitled to receive the interest derived from the investment of such royalties prior to April 26th, 1931, at which time, the principal should be divided among the heirs of the

decedent. We quote the following excerpt taken from page 850, to-wit:

> " * * * * These minerals were part of the homestead, and the lease was to operate as a sale of them as and when they were extracted. In that sense, the heirs were exchanging a part of the homestead for the money paid as royalties, but no heir was surrendering any right to the others. Thus the rights of all in the royalties were the same as in the homestead. * * * * "

The Supreme Court of the State of Wyoming, in State vs. Snyder, 212 Pac. 758, recognized this distinction in the following language:

> " * * * * *Oil and gas, while in situ, are part of the realty; part of the corpus of the land. When a portion of it is taken away, the proceeds necessarily arise out of the corpus, and it is humanly impossible to change that simple, plain, physical fact. The character of the proceeds can, obviously, at least as between the beneficiaries, in no possible manner be changed by the nature of the documentary authority pursuant to which the oil and gas is taken out of the ground. Documents do not possess the power of an alchemist; neither do they wield a magician's wand. Whether the oil be taken out of the ground pursuant to a license, lease sale, or any other grant, or without any authority whatever, could not in the slightest degree affect the physical fact that it comes from the corpus of the land. If taken and disposed of at all, the effect is clearly a permanent disposition of that much of the corpus, the principal of the land, and irrespective of the authority pursuant to which that is done.* * * * " (Italics ours.)

But without regard to the nature of the income and even if considered as ordinary rents and produce, the tax can not be sustained. This court, in Pollock vs. Farmers' Loan & Trust Co., 157 U. S. 429, 39 L. Ed. 759, lays down

the broad principle that a tax upon the income from land is a tax upon the land itself. There, it is said:

> *"If the Constitution had provided that Congress should not levy any tax upon the real estate of any citizen of any state, could it be contended that Congress could put an annual tax for five or any other number of years upon the rent or income of the real estate?* And if, as the Constitution now reads, no unapportioned tax can be imposed upon real estate, can Congress, without apportionment nevertheless *impose taxes upon such real estate under the guise of an annual tax upon its rents or income?*
>
> "As according to the federal law, the whole beneficial interest in the land consisted in the right to take the rents and profits, the general rule has always been, in the language of Coke, that, *'if a man seized of land in fee by his deed granted to another the profits of those lands, to have and to hold to him and his heirs, and maketh livery secundum forman chartae, the whole and itself doth pass. For what is the land but the profits thereof?'* Co. Lit. 54. *And that a devise of the rents and profits or of the income of lands passes the land itself both at law and in equity.* 1 Jarm. Wills (5th Ed.) No. 798, and cases cited.
>
> "The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment—the prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes—and it is admitted that a tax on real estate is a direct tax. *Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself* that it belongs to a wholly different class of taxes, such *taxes must be regarded* as falling within the same category *as a tax on real estate eo nomine. The name of the tax is unimportant. The*

real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. This law taxes the income received from land and the growth and produce of the land. Mr. Justice Patterson observed in Hylton vs. United States, 3 U. S. 3 Dell. 171 (1:556), *'Land independently of its produce, is of no value,'* and certainly had no thought that direct taxes were confined to unproductive land." (Italics ours.)

See also: Thomas vs. Gray, 169 U. S. 264, 42 L. Ed. 740; Gillespie vs. State of Oklahoma, 275 U. S. 501, 66 L .Ed. 338; Kelsay vs. Kelsay Land Co., 64 Okla. 291, 166 Pac. 173; Jaybird Mining Co. vs. Weir, 46 Sup. Ct. Rep. 582; Choctaw O. & G. R. Co. vs. Harrison, 235 U. S. 219, 59 L. Ed. 237; Brown vs. Maryland, 25 U. S. 12; Weston vs. Charleston, 27 U. S. 2 Pet. 449; Dobbins vs. Erie County Commissioners, 41 U. S. 16 Pet. 435; Almy vs. California, 65 U. S. 24, Howard 169; Cook vs. Penn, 97 U. S. 566; Northern Central Ry. Co. vs. Jackson, 74 U. S. 7 Wall. 262; Hylton vs. U. S. 3 U. S. Dall. 171.

The state authorities rely heavily upon the case of Forbes vs. Gracey, 94 U. S. 762, 24 L. Ed. 313, and the Oklahoma Supreme Court cites Elders vs. Wood, 208 U. S. 226; Belk vs. Meager, 104 U. S. 283; Manuel vs. Wulff, 152 U. S. 505; St. Louis Mining & Milling Co. vs. Montana Mining Co., 171 U. S. 650, in support of its decision of the case. We think that these cases are clearly distinguishable from the case at bar. The case of Forbes vs. Gracey, supra, which appears to be in the main reliance of the state, is the only case referred to involving a gross production case, predicated upon the value of the product of the mine. That

case, however, is not analagous to the case at bar. If we were considering the interest of the producer in the oil produced from plaintiffs' tax exempt lands, then we should have a state of facts somewhat similar to those presented in Forbes vs. Gracey, supra. We concede that the state has the power to levy a tax upon the value of the lease, and lessees' portion of the oil and gas produced thereunder, as property in the hands of the lessee. But that is quite different from taxing plaintiffs' portion of said minerals under the conditions alleged in the amended petition. This court lays down the following rule in the third paragraph of the syllabus in Forbes vs. Gracey, supra, to-wit:

> "The Nevada statute which makes a tax on such ore a lien on the mines or mining claims from which the ore is extracted, is not an interference with the right of property of the government in the lands from which the ore is extracted."

The court upholds the Nevada statute which makes a tax on the ore a lien upon the mining claim for the reason that under the Federal statute in regard to mining claims, the title and property rights of the owner of the mine are wholly separate and distinct from the title of the government to the remaining portion of the land, as above stated.

Elders vs. Wood, supra, involves an ad valorem tax upon the mining claim itself, wholly separate and distinct from the government's ownership of the land; no question of federal agency was involved and no property rights of the government was sought to be taxed; and this court simply held that a tax levied upon the property rights of the owner of the mining claim was valid exercise of power by the state.

Belk vs. Meager, supra, involves a contract in ejectment by one claimant against another and no question of taxation was presented, but simply a question of priority of claims.

(c) The Tax, if Enforced Against Petitioners and Their Assignors, Would Deny to Them the Uniformity of Operation of the Tax Laws of the State of Oklahoma, and Would Deny to Them the Equal Protection of the Law.

Section 50, Article 5, of the Oklahoma Constitution, requires that all property except such as therein expressly exempt, shall be subject to taxation, and Section 8, of Article 10, provides, that all property shall be assessed at its fair cash value, and Section 5, Article 10, provides, that all taxes shall be uniform upon the same class of subjects. Therefore, a greater rate of tax can not be levied against the petitioners and their assignors than is levied against the property of other persons of the same classification. It is definitely shown above, we believe, that the tax as to the royalty owner, when generally applied, includes the royalty interest in the land. Therefore, to hold that the tax as to the plaintiffs and their assignors is levied against the royalty oil and gas actually produced from their lands during the taxable year, denies to them the uniformity of application of the tax laws, and denies to them the equal protection of the laws of the state and constitutes the taking of their property without due process of law; all in violation of the constitutional provisions of the state above cited, and the 5th and 14th Amendment to the Constitution of the United States.

In the case of Sioux City Bridge Co. vs. Dakota County, Nebr., 260 U. S. 441, 67 L. Ed. 340, the following rule is laid down in the first paragraph of the syllabus:

> "A bridge company is denied the equal protection of the laws, in violation of the 14th Amendment of the Federal Constitution, by the assessment of its property at full value while the other property in the county is assessed at only fifty-five-one-hundredths of its value."

PART 2

The Tax, as Applied to Petitioners and Their Assignors is Utterly Void for Want of Jurisdiction to Enforce the Same, and Statutes of Procedure, Which Govern in Cases of Suits to Recover Taxes on Account of Error in Assignment, Have no Application.

In this case a part of the tax was paid "at the time and in the manner provided by law"—that is, before delinquency—and a portion of the tax was delinquent at the time the same was paid. So the further question is presented whether in any event plaintiffs can recover that portion of the tax which was paid after delinquency. The state court held that they could not, and petitioners contend that such ruling was erroneous. The case of Ward vs. Love County, 253 U. S. 17, 64 L. Ed. 751, is applicable. There it was said:

> "As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. It is a well-settled rule that 'money got through imposition' may be recovered back; and, as this court has said on several occasions, 'the obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' Marsh vs. Fulton County, 10 Wall. 676, 684 L. Ed. 1040, 1042; Louisiana vs. Wood, 102 U. S. 294, 298, 299, 26 L. Ed. 153, 155; Chapman vs. Douglas County, 107 U. S. 348, 355, 27 L. Ed. 378, 381, 2 Sup. Ct. Rep. 62. To say that the county could collect these unlawful taxes by coercive means, and not incur any obligation to pay them back, is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course, this would be in contravention of the 14th Amendment, which binds the county as an agency of the state."

The Oklahoma Supreme Court, in Walker, et al vs. Hays, et al, 127 Okla. 123, 260 Pac. 15, held that the provisions of the statute as to payment of taxes under protest and suit to recover the same was not applicable to taxes levied against the improvements placed upon a restricted Indian allotment as the state was without power to enforce the tax. See also: A. T. & S. F. Ry. Co. vs. O'Connor, 223 U. S. 280, 56 L. Ed. 436.

CONCLUSION

In conclusion, we most respectively urge that the tax cannot be inforced as against the petitioners and their assignors in this action for the reason that the statute, when properly construed, and as construed by the Supreme Court of the State of Oklahoma, is a tax not upon the produce of the land, but upon the land itself; and further, that even if the tax be considered as a tax upon the produce and income derived from the land, nevertheless, the tax is invalid, for the reason that the allottees' receipt of royalties is but a conversion of a portion of their real estate into cash and amounts to a sale of a portion thereof, or interest therein, and such tax is therefore a tax upon the land; but even if considered as ordinary rents and income, still a tax thereon is a tax upon the land itself and therefore uninforcable under the rule announced in Pollock vs. Farmers' Loan & Trust Co., and other cases, supra.

And we further most earnestly insist that the state is without jurisdiction or authority to inforce the tax against petitioners and their assignors as to their royalty interests during the period of time involved in this action, and that statutes of procedure of the State of Oklahoma which govern in cases to recover a tax by reason of some mere irregularity in the assessment can have no application here, where the tax is absolutely void.

Most respectfully submitted,

STEPHEN A. GEORGE,
J. B. MOORE,
Counsel for Petitioners.

APPENDIX

FEDERAL STATUTES

A portion of Section 29 of the Act of Congress of June 28, 1898, ratified August 24, 1898, commonly known as the Atoka Agreement (30 Stat. 495), is as follows:

"All the lands allotted shall be non-taxable while the title remains in the original allottee, but not to exceed twenty-one years from date of the patent."

STATE STATUTES

Section 9814, C. O. S. 1921:

"Every person, firm, association or corporation engaged in the mining or production within this state of asphalt or of ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other crude oil or other mineral oil or of natural gas, shall, within thirty days after the expiration of the quarter-annual period ending on the last day of March, A. D., 1916, and of each quarter-annual period thereafter, expiring respectively, on the last day of June, September and March of each year, file with the State Auditor a statement under oath, on forms prescribed by him, showing the location of each mine or oil or gas well operated by such person, firm, corporation or association during the last preceding quarter-annual period; the kind of such mineral, oil or gas produced; the gross amount thereof produced, and the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable and whether it is claimed that such royalty is exempt from taxation by law, and the facts on which such claim of exemption, if any, is based; and such other information pertaining thereto as the State Auditor may require, and shall at the same time pay to the State Auditor a tax equal to one-half of one per centum of the gross value of asphalt and of ores bearing lead, zinc, jack, gold, silver and copper produced, less the royalty interest, and equal to three per-centum of the gross value of the production of petroleum

or other crude or mineral oil and of natural gas, less the royalty interest. The owner of any royalty interest shall pay to the State Auditor the tax herein imposed upon such royalty interest within the time and in the manner provided by this act.

"The tax hereby declared shall also attach to and is levied on what is known as the royalty interest except such royalty interest of the State of Oklahoma or such royalty interests as are exempted from taxation under the laws of the United States and the amount of the tax on the royalty interest shall be a lien on such interest.

"The State Auditor shall have power to require any such person, firm, corporation or association engaged in mining or the production of such asphalt, mineral ores aforesaid, petroleum or other crude oil or other mineral oil and natural gas or owner of any royalty interest therein to furnish any additional information by him deemed to be necessary for the purpose of correctly computing the amount of said tax and to examine the books, records, and files of such person, firm, corporation or association and shall have power to examine witnesses, and if any witness shall fail or refuse to appear and testify at the summons or requests of the State Auditor, said State Auditor shall certify the facts and the name of the witness so failing and refusing to appear and testify or to produce any book, record or file to the District Court of this state having jurisdiction of the party, and said court shall thereupon issue a summons to said party to appear and give such evidence and produce such books, records and files as may be required, and upon failing to do so, the offending party shall be punished as provided by law in case of contempt.

"The State Auditor shall have power to ascertain and determine whether or not any return herein required is a true and correct return of the gross products and of the value thereof of such person, firm, corporation or association engaged in the mining or production of asphalt and ores bearing minerals aforesaid and of petroleum or other crude oil or mineral oil and of natural gas, and if any per-

son, firm, corporation or association has made an untrue or incorrect return of the gross production or value thereof, as hereinbefore required, or has failed or refused to make such return, the said State Auditor shall ascertain the correct amount of either, and compute said tax.

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in the paragraph mentioned or described; but any interest in the land other than that herein enumerated and oil in storage, asphalt, and ores bearing the minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time.

"The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall, take testimony to determine whether the taxes herein imposed are greater, or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated, including the value of oil, gas or mineral lease, or of

the mining or mineral rights, the machinery, equipment or appliances used in the actual operation of, in and around any such well or mine, the value of the oil, gas, asphalt or any of the said mineral ores produced, and any other element of taxable value in lieu of which the tax herein is levied. The said board shall have power, and it shall be its duty to raise or lower the rates herein imposed to conform thereto. An appeal may be had from the decision of the State Board of Equalization thereon, by any person aggrieved, to the Supreme Court, in like manner and with like effect as provided by law in other appeals from said board to said court; provided, that after such tax has been collected and distributed, or paid without protest, no complaint with reference to rate thereof shall be heard or considered."

Section 9971, C. O. S. 1921:

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days, and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein, if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting

officer shall pay to such person the excess and shall take his receipt therefor."

Section 9973, C. O. S. 1921:

"None of the acts herein required to be done shall be enjoined by a court of equity, but any person aggrieved in any matter of collection, assessment or levy of any tax herein provided for shall pay the tax at the time and in the manner provided by law, except as stated in Section 2, Article 2-B, hereof, and at the time of payment shall file a written statement with the State Auditor, under oath, as provided in Sections 10-11, Article 2-B, hereof, fully setting forth his complaint. The Auditor shall retain the payment as a special deposit to await the final decision on said complaint. And thereupon the same right of hearing and review shall be had upon said complaint as provided for herein in Sections 10-11 of Article 2-B hereof."

FILE COPY

FILE
OCT 28
CHARLES ELMOR

Supreme Court of the United States

October Term 1929

No. 50

T. L. CARPENTER AND LILLIE V. CARPENTER, PETITIONERS,

vs.

A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, RESPONDENT.

BRIEF OF RESPONDENT.

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No. 50

T. L. CARPENTER AND LILLIE V. CARPENTER, PETITIONERS,

vs.

A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, RESPONDENT.

BRIEF OF RESPONDENT.

STATEMENT.

This action was instituted in the District Court of Oklahoma County against the respondent as State Auditor of the State of Oklahoma to recover gross production tax that had been paid by petitioners and assignors of petitioners on production of oil from land situated in Carter County, Oklahoma.

Petitioners alleged that T. L. Carpenter is enrolled as an intermarried Choctaw Indian, and that Lillie V, Carpenter is enrolled as a Choctaw Indian of one-sixteenth blood, and that petitioners owned allotments in Carter County, Oklahoma, from which oil was produced during

the calendar year 1926 and the first quarter annual period ending March 31st, 1927; that the assignor of petitioners, Mattie L. V. Zachary, was enrolled as a Choctaw Indian of one-sixty-fourth blood and had an allotment in Carter County, Oklahoma, and that Julia A. Morris, the other assignor of petitioners, was enrolled as a one-thirty-second Choctaw Indian and had an allotment as such in Carter County, Oklahoma.

Petitioners alleged that they and their assignors executed oil and gas leases on such allotments and that as to each of them they were still the owners of such allotments, and that twenty-one years from date of patent had not, when the suits were filed, expired. That during the calendar year 1926 and the first quarter annual period ending March 31st, 1927, oil was produced under said leases and that they paid to the state a gross production tax equal to 3 per cent of the value of the one-eighth royalty interest reserved to them as and when said oil was produced.

Petitioners further alleged that they paid the gross production taxes in the amounts assessed by the State under protest on April 30, 1927, not only for the quarter annual period ending on March 31, 1927, but for all four quarter annual periods during the calendar year 1926, and instituted this suit to recover said tax.

The petition contained no allegation by petitioners

that they were incompetent restricted Indians nor that the oil was produced under a departmental lease. In fact it is admitted that petitioners and their assignors were all unrestricted Indians with full power to encumber or convey their land as well as to lease the same for oil and gas purposes.

To the petition filed in the local court respondent filed a demurrer setting up the fact that as to the taxes due for the year 1926 the same were not paid when due and at the time required by law, but were delinquent when paid and that the facts pleaded did not constitute a cause of action in favor of petitioners and against the respondent. This demurrer was sustainerd by the trial court and upon appeal to the Supreme Court of the State of Oklahoma the judgment of the trial court was affirmed.

The opinion of the Supreme Court of the State of Oklahoma, the same being the court of last resort in the State of Oklahoma, is reported in 272 Pac. at page 393.

After a denial of a petition for rehearing a writ of certiorari was allowed on the 15th day of April, 1929. The complete opinion of the Supreme Court of the State of Oklahoma is found in the Stipulated Transcript Record at pages 29 to 50, both inclusive.

ARGUMENT AND BRIEF.

In this brief on behalf of respondent we will confine ourselves to a consideration of the following questions of law raised by petitioners in the order named:

I.

As to payment of taxes for the calendar year 1926, petitioners cannot recover because they did not comply with the local law as to payments and suits for recovery thereof.

II.

The oil here sought to be taxed is not exempt from state taxation by any act of Congress or Indian treaty, and when severed from the soil in which it is embedded becomes personal property, subject to taxation.

III.

The exaction of the tax in question does not deny petitioners the equal protection of the law under the Fourteenth Amendment.

In considering the above principles of law we will discuss the cases relied upon by petitioners, which they claim are opposed to the principles above set forth.

I.

As to payment of taxes for the calendar year 1926, petitioners cannot recover because they did not comply with the local law as to payments and suits for recovery thereof.

The tax sought to be imposed by the State of Oklahoma in the instant case is levied by Section 9814, Compiled Oklahoma Statutes 1921, which is quoted in full in petitioners' brief on page 26 thereof.

Said statute requires that the tax levied shall be paid "within thirty days after the expiration of the quarter annual period ending on the last day of March, A. D. 1916, and of each quarter annual period thereof expiring respectively on the last day of June, September, December and March of each year."

By Section 9815, Compiled Oklahoma Statutes 1921, the tax provided for becomes delinquent after the date fixed for each quarter annual payment.

In order therefore for petitioners to have paid the taxes for the calendar year 1926 at the time required by law such payment must have been made April 30th, 1926, July 30th, 1926, October 30th, 1926, and January 30th, 1927.

Petitioners' right to recover the taxes under local law arises under Section 9971, Compiled Oklahoma Statutes 1921, which is quoted in full on page 29 of petitioners' brief.

The established rule under many decisions of the Supreme Court of Oklahoma is that unless taxes are paid at the time and in the manner provided by law

they may not be recovered under Section 9971, Compiled Oklahoma Statutes 1921.

St. Louis & San Francisco Ry. Co. v. *Hendrickson, County Treasurer,* 127 Okla. 242, 260 Pac. 476.

St. Louis & San Francisco Ry. Co. v. *Hendrickson, County Treasurer,* 128 Okla. 266, 263 Pac. 148.

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National Bank of Muskogee v. *Pitts,* 120 Okla. 8, 249 Pac. 907.

State ex rel. Mothersead v. *Bennett,* 114 Okla. 76, 243 Pac. 726.

The Supreme Court of Oklahoma following said above decisions held therefore that petitioners were not entitled to recover the gross production taxes due from petitioners for the calendar year ending December 31st, 1926, for the reason that such taxes were not paid until April 30, 1927.

Petitioners seek to avoid the rule laid down by the Supreme Court by applying the decision of this Court in *Ward* v. *Board of County Commissioners of Love County,* 253 U. S. 17, 64 L. ed. 751.

The only question presented by said case is as to whether the payment of taxes was voluntarily made or was made under protest by the Indians in question, and the court held from the facts in the case that the taxes were not voluntarily paid and could be recovered. We

believe it is established by the case of *McCoy* v. *Shaw*, 277 U. S. 302, 72 L. ed. 891, that before petitioners can recover the taxes in question they must comply with the local law with reference to recovery thereof. There petitioner McCoy sought to enjoin the collection of the gross production tax levied by the State of Oklahoma upon his one-eighth royalty interest in oil produced from his homestead and surface allotments from which restrictions on alienation had been removed. The Supreme Court of Oklahoma held that an adequate remedy at law existed under Section 9971, Compiled Oklahoma Statutes 1921, the statute under which petitioners in this case are proceeding. This Court held that the decision of the State court was based upon non-federal grounds broad enough to sustain the decision and therefore dismissed the writ of certiorari for want of jurisdiction.

II.

The oil here sought to be taxed is not exempt from state taxation by any act of Congress or Indian treaty, and when severed from the soil in which it is embedded becomes personal property, subject to taxation.

To determine whether or not petitioners' property is exempt from taxation under any act of Congress or Indian treaty it is necessary to consider briefly the acts of Congress relating to petitioners' land.

By the Act of Congress of June 28th, 1898, 30 Stats. 495, commonly known as the Atoka Agreement relating

to the Choctaw-Chickasaw Nations, a separate allotment for each of said Indians was provided for with this further provision:

> "All allotted land shall be non-taxable so long as title remains in the original allottee, not exceeding however twenty-one years from the date of patent."

It is by virtue of this exemption of the allotted land of these petitioners that they contend that the oil produced therefrom is exempt from taxation.

In arriving at the true meaning and extent of such exemption "subsequent congressional legislation may be considered as an aid to the interpretation of prior legislation upon the same subject."

> *Tiger* v. *Western Investment Company et al.*, 221 U. S. 286, 55 L. ed. 738.

Subsequent to the enactment of the act of Congress above mentioned the Act of May 27th, 1908, 35 Stats. 312, was enacted by which it was provided in part that:

> "From and after sixty days from the date of this act the status of the lands allotted heretofore or hereinafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or encumbrances, be as follows: 'All lands including homesteads of said allottees enrolled as intermarried whites, as freedmen, and as mixed blood Indians having less than one-half Indian blood, including minors, shall be free from all restrictions.' * * * that all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property

of other persons than allottees of the Five Civilized Tribes."

The above quoted provision of the Act of May 27th, 1908, applies to the petitioners in this case who are less than one-half Indian blood, and by said act all restrictions against alienation as to the petitioners and their assignors were removed, and after the passage thereof the same might be either sold or leased by petitioners without any governmental supervision. It will be noted that it was plainly provided by Congress that the land of these petitioners, as to which restrictions upon alienation were removed, should be subject to taxation by the State the same as the land of white persons. However, in *Choate* v. *Trapp*, 224 U. S. 665, this Court held that the provision of the Act of Congress of May 27, 1908, making said unrestricted lands subject to taxation violated the vested right of such Indians to exemption from said taxation which was protected by the Fifth Amendment to the Constitution of the United States. In the opinion the Court said:

"The provision 'that all lands shall be non-taxable' naturally indicates that the exemption is attached to the land, * * * only an artificial rule can make it a personal privilege."

By said decision therefore it was established that these petitioners were entitled to non-taxable land so long as they held the title to their allotments, not exceeding twenty-one years from date of patent, but the cases

dealt solely with the right of the State to Tax the Indians' *land* and did not deal with his oil produced therefrom which became personal property upon production.

Although the provision of the Act of Congress of May 27th, 1908, specifically making the land of less than one-half blood Indians subject to taxation, was ineffective for that purpose it nevertheless shows an intention of Congress to make such land taxable if possible and negatives any idea of Congress to continue the exemption from taxation after the removal of restrictions.

We think this act may be considered by the Court in determining the meaning of the exemption originally granted these petitioners by Congress, and though unable to give effect to the full provision making the land taxable, we believe the exemption granted should not be extended beyond its exact terms and should be held to apply to his land only and not to oil produced from his land.

The further intention of Congress to require these Indians to bear their burden of supporting the State of Oklahoma is evidenced by the Act of May 10, 1928, Section 3, Ch. 517, Acts Seventieth Congress, Session I, at page 496, being as follows:

> "That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full

blood Indian heirs or devisees of such lands, shall be subject to all state and federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the Individual Indian funds under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas and other mineral production."

That this has also been the trend of the recent decisions of the Supreme Court of the United States is indicated by the case of *Shaw* v. *Gibson-Zahnisher Oil Corp. et al.*, 276 U. S. 575, 72 L. ed. 709, wherein Mr. Justice Stone uses the following language (pages 713-714):

"The early legislation affecting the Indians had as its immediate object the closest control by the government of their lives and property. The first and principal need then was that they should be shielded alike from their own improvidence and the spoliation of others, *but the ultimate purpose was to give them the more independent and responsible status of citizens and property owners.* The present statute which enabled Miller Tiger to become the owner of the lands leased to the plaintiff is typical of the latter course of Indian legislation, which discloses a purpose to accomplish that end not only by the gradual relinquishment of restrictions upon the lands originally allotted to the Indians, but by encouraging their acquisition of other property and gradually enlarging their control over it until independence should be achieved. See *McCurdy* v. *United States*, *supra*, * * *.

"*In this, as in other Indian legislation, opportunity is afforded for their emancipation by imposing upon*

them duties as well as giving them the privileges of citizens and property owners, including the duty to pay taxes.''

Furthermore, the well known rule as stated in Cooley on Taxation, page 146, is that:

> ''The intention to exempt must in any case be expressed in clear and unambiguous terms.''

In *Llewellyn* v. *Colonial Trust Company,* 72 L. ed. 19, Mr. Justice Stone said:

> ''Tax exemptions are never lightly to be inferred'' (citing cases).

In *Goudy* v. *Meith,* 203 U. S. 146, 51 L. ed. 130, the court, in considering the question as to whether the land owned by an Indian was exempt from taxation, said:

> ''His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemptions for him must be the same as for other citizens—that is, that no exemption exists by implication, but must be clearly manifested.''

The contention of respondent in this case is that Congress, by the Atoka Agreement above mentioned, attempted to exempt from taxation only the land of petitioners and that, since exemptions by implication do not exist, and that since Congress has evidenced a desire even to tax the land of this petitioner, that said tax exemption should not extend to their oil produced from said land, which the State seeks to tax in this case, because when

served from the land such oil becomes personal property not covered by said tax exemption.

In the early case of *Forbes* v. *Gracey*, 94 U. S. 762, an action was brought to enjoin the collection of the Nevada gross production tax. The tax, by the State statute of Nevada, was imposed upon the proceeds of the mine worked by a corporation, and the tax was resisted on the ground that the title to the land from which the mineral was taken was in the United States, and was not for that reason liable to state taxation. The court held that the State had power to impose the tax in question upon the mineral taken from the land, the title to which was in the United States, and that the moment the ore became detached from the soil in which it was embedded it became personal property, subject to taxation, although the land from which it was taken was not taxable. From the opinion the following language is taken:

"It is very true that Congress has, by statutes and by tacit consent, permitted individuals and corporations to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the government, without exacting or receiving any compensation for those ores, and without requiring the miner to buy or pay for the land. It has gone further, and recognized the possessory rights of these miners, as ascertained among themselves by the rules which have become the laws of the mining districts as regards mining claims. See Revised Statutes, Title XXXII, Chap. 6, Sections 2318-2352. But in doing this it has not

parted with the title to the land, except in cases where the land has been sold in accordance with the provisions of the law on that subject. If the tax of the State of Nevada is, in point of fact, levied on this property right of the United States, we are bound by our previous decisions and by sound principle to hold that it is void. If, on the other hand, it is levied on property of the miner, and may be collected without affecting or embarrassing the title of the United States to property which belongs to that government, then there is no ground for interference with the processes of the State in its collection. A few extracts from the statute of Nevada, showing the nature and character of the property on which the contested tax is imposed, and the manner of its enforcement and collection, will enable us to decide whether it belongs to the one or the other of these classes. We copy here the important sections of the Act of February 28, 1871, imposing this tax: [here the court quotes the statutes] * * *.

"As we construe the statutes of the United States and the recognized rule of the government on this subject, the moment this ore becomes detached from the soil in which it is embedded it becomes personal property, the ownership of which is in the man whose labor, capital and skill has discovered and developed the mine and extracted the ore or other mineral product. It is then free from any lien, claim, or title of the United States, and is rightfully subject to taxation by the State as any other personal property is.

"The truth of this proposition is too obvious to need or admit of illustration or elaboration, and, as we have already said, the pressure of business does not admit of it.

"In regard to the taxing of this personal property, and the mode of collecting it by sale as provided in the section last cited, it does not seem to us that

there can be any ground for asserting that the United States has any interest in the tax or in the sale of the property taxed."

In the Gracey case, *supra,* the government owned the land from which the ores were produced. That land owned by the United States and lying within the State is not taxable by the State has been long established; *Van Brocklin* v. *Tennessee,* 117 U. S. 151. The land from which the ores in the Gracey case were produced was as evidently free from State taxations as is petitioners' land exempted from State taxation by the Atoka Agreement above referred to. This Court, however, regardless of the fact that lands belonging to the United States are non-taxable by the State, held that when the minerals were produced they became personal property and subject to taxation. The minerals in that case were in the same position that petitioners' oil in the instant case occupies, and this Court sustained the State's tax in the Gracey case, regardless of the exemption of the land from taxation. Petitioners say that the Gracey case, *supra,* is not analogous to the instant case, in that in said case the government did not own the minerals, whereas in this case petitioners do own the oil sought to be taxed. This does not appear to be a distinguishing principle, however, because the proposition of law established by the Gracey case, *supra,* is that even though the land from which minerals are produced is exempt from taxation, the minerals so produced becoming personal property, are not entitled to such exemption. Since *Choate* v. *Trapp, supra,* holds that petitioners' tax exemption attaches to the land itself and is not a personal

privilege it is immaterial that petitioners own the oil here sought to be taxed.

We believe the court was clearly right in the Gracey case, *supra,* in holding that minerals when severed from the land became personal property and subject to taxation. In fact, we think it cannot be urged that oil when severed from the land is not personal property.

In *Elders* v. *Wood,* 208 U. S. 226, the Gross Production Law of the State of Colorado was sustained and the tax held to be valid. In said case it was contended that the gross production tax upon the mining claims and products from the mines granted by the United States was invalid for the reason that the operation of such mines was a Federal agency, which the State had no right to tax. The opinion of the court was delivered by Mr. Justice Moody, holding that the property value of the claims and the products obtained from the mines were property belonging to the operator of the mines, the court saying:

> "Such an interest from early times has been held to be property distinct from the land itself, vendable, inheritable and taxable."

In *Belk* v. *Meager,* 104 U. S. 283, it was held:

> "A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent" (citing *Forbes* v. *Gracey, supra*).

See, also:

> *Manuel* v. *Wulff,* 152 U. S. 505.
> *St. Louis Mining & Milling Company* v. *Montana Mining Company,* 171 U. S. 650.

In *Kelly* v. *Ohio Oil Co.,* 39 L. R. A. 765, the Supreme Court of Ohio was required to determine the rights of

adjoining land owners to take oil from the land and the right of one landowner by drilling wells to draw oil from beneath the land of adjoining land owners. An injunction was sought to prevent an adjoining land owner from offsetting plaintiff's land and extracting oil from the land of plaintiff. In the opinion the court sad:

> "*Petroleum oil is a mineral, and while in the earth it is a part of the realty, and, should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and, if it moves to the next adjoining tract,* IT BECOMES part and parcel of that tract; and it forms part of some tract until it reaches a well, and is raised to the surface, and then for the first time it becomes the subject of distinct ownership, separate from the realty, *and becomes personal property*—the property of the person in whose well it came. And this is so whether the oil moves, percolates, or exists in pools or deposits. In either event, it is the property of, and belongs to, the person who reaches it by means of a well, and severs it from the realty, and converts it into personalty. * * *."

In *Nonamaker* v. *Amos*, 76 N. E. 949, 4 L. R. A. (N. S.) 980, the Supreme Court of Ohio had before it the question as to whether or not a change of the consideration for an oil lease was a contract in regard to land or an interest in land, and therefore prohibited by the statute of fraud by parol agreement. In the opinion it is said:

> "The title to the land is not involved, nor is any interest or estate therein. The question arises on a lease supplemented by a parol contract with reference to the consideration. There is no controversy over the extent of the grant, and the parol contract does not undertake to lessen or enlarge the estate

granted. Touching the division of the oil when brought to the surface, the written lease stipulates that the lessees shall yield and pay 'to the lessor the one-sixth part of the oil produced and saved from the premises, delivered free of expense into the tanks or pipeline to the lessor's credit * * *.' This share is the lessor's compensation for the lease and the rights granted therein. The five-sixths go to lessees by virtue of the same instrument, because the grant to them was the oil contained in the premises. Therefore the parol contract related to personal property, and not real estate, or an interest in or concerning the same. In *Kelly* v. *Ohio Oil Co.*, 57 Ohio St. 317, 39 L. R. A. 765, 63 Am. St. Rep. 721, 49 N. E. 399, this court held that petroleum oil is a mineral, and while it is in the earth it forms part of the realty; and, when it reaches a well and is produced on the surface, it becomes personal property, and belongs to the owner of the well. In the opinion by Burket, J. (on page 328 of 57 Ohio St., page 768 of 39 L. R. A., page 722 of 63 Am. St. Rep., and page 401 of 49 N. E.), it is said: 'Petroleum oil is a mineral, and while in the earth it is part of the realty, and should it move from place to place by percolation, or otherwise, it forms part of that tract of land in which it tarries for the time being, and, if it moves to the next adjoining tract, it becomes part and parcel of that tract; and it forms part of some tract until it reaches a well and is raised to the surface, and then for the first time it becomes the subject of distinct ownership separate from the realty, and becomes personal property, the property of the person into whose well it came. * * * It is property of, and belongs to, the person who reached it by means of a well and severs it from the realty and converts it into personalty.' The same doctrine is again laid down in *Northwestern Ohio Natural Gas Co.* v. *Ullery*, 68 Ohio St. 259, 67 N. E. 494.

"The lessees, by the written instrument, agreed to

drill and operate for oil, and of what they would thus produce from the wells, and thereby sever from the realty, they were to yield and pay to the lessor 'one-sixth.' Hence, when the parties entered into the parol contract as found by the lower court, they were not contracting for an interest in or concerning real estate, but for a division of personal property in proportions different from those named in the written lease. * * *."

In *Kelly* v. *Keys*, 62 Atl. 911, the Supreme Court of Pennsylvania held that the lessee in an oil lease did not have such an interest in land as entitled him to maintain ejectment. In the opinion the Court said:

"In no case is it held that the grant of an exclusive right to mine for and produce oil, though it be a mineral, is a sale of the oil that may afterward be discovered. When under such a grant oil has been discovered, it is the grantee's right to produce it and sever it from the soil. So much as thus severed belongs to the parties entitled under the terms of the grant, not as any part of the real estate, however, but as a chattel, and only so much as is produced and severed passes under the grant. * * * The reason for the rule thus established is to be found in the peculiar character of mineral oil. This is very clearly indicated in the earlier cases, where the distinction is drawn between minerals which are fugacious in their nature, such as water, gas and oil, and those which have a fixed *situs* and are necessarily part of the land; and this distinction has been allowed with controlling significance whenever oil *in situ* has been the subject of the dispute. Both rule and reason are against the theory that prevailed with the court below, to the effect that, the mineral once discovered, all that was *in situ* became in law part of the real estate.

"With the rights of the appellee thus defined and limited by the cases cited above, it is manifest, without discussion, that he is in no position to maintain ejectment for the property."

We believe that the above authorities definitely establish the proposition that oil, when severed from the land, becomes and is personal property and that, therefore, since only petitioners' land is exempt from taxation, such exemption should not be extended to their personal property.

CASES RELIED UPON BY PETITIONERS.

In their brief petitioners call the Court's attention to the case of *Barnes* v. *Keys,* 127 Pac. 261, the syllabus of which is as follows:

"Where the owners of a life estate and the owners of the remainder join in an oil and mining lease, and the lessee develops the lease and produces oil, the life tenants are entitled either to have the royalties invested and to receive the income therefrom, or to receive such a proportion of the royalty as will amount to the present value of an annuity for the life expectancy of the life tenant equal to the interest on the royalties at 6 per cent."

In the opinion, the Court said:

"As was held in *Stoughton's Appeal,* 88 Pa. 201, and other cases in same line, oil in place is a mineral, and, being a mineral, it is part of the realty."

With this proposition defendant agrees, because it is admitted by all that oil, until severed, is part of the

land, but that does not affect the proposition that oil, when severed, is personal property.

Petitioners also cite *State* v. *Snyder*, 212 Pac. 758, the fourth paragraph of the syllabus of which is as follows:

> "Under act of admission, Section 4, granting school lands to the state, but by Section 13 excluding mineral lands, and Section 5 requiring disposition by public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended for maintenance, but permitting five-year leases, and under Const. Art. 7, Section 2, declaring proceeds from such sales or leases to be a perpetual fund, and Const. Art. 7, Section 7, restricting application of rents from unsold lands to the support of free schools, *Held*, that rents and royalties derived from oil leases are not the ordinary rents contemplated by Const. Art. 7, Sec. 7, but arise from and represents the corpus of the land, and must be treated as principal becoming part of the permanent school fund, and Laws 1921, c. 66, and Laws 1921, c. 147, amending Compiled Statutes 1920, Section 144, are unconstitutional insofar as authorizing diversion of oil rents and royalties from the permanent fund."

It will be noted that in said case the question was whether rents and royalties derived from oil leases from the school lands of Wyoming should be paid into the permanent school fund or whether such rents and royalties might be used in the support of said school. It will be noted that the constitutional provision under consideration in said case provided that *proceeds* from the sale of school land should constitute a permanent school fund.

It is evident, therefore, that the decision in that case holding that the rents and royalties should go to the permanent school fund was correct, because they were certainly proceeds from school lands. If, in the instant case, the act of Congress exempted the land of the Indian and the proceeds from his land, the case would be in point here, but under the act of Congress above quoted the exemption runs to the land alone and not to the proceeds from the land. We believe, therefore, that the Snyder case is distinguishable in principle from the case at bar.

Petitioners also rely upon the case of *State ex rel.* v. *Hatcher*, 281 S. W. 192, in which case the Supreme Court of Texas dealt with the same question as that dealt with by the Supreme Court of Wyoming in the Snyder case, *supra*, and in which case the Supreme Court of Texas quotes with approval from the Snyder case. The first paragraph of the syllabus is as follows:

"Oil is part of 'land', and can be sold in place."

The question before the court was as to whether or not under the constitutional provision providing that the proceeds from the sale of school land should go to the permanent school fund of the State of Texas controlled as to rents and royalties derived from oil leases on such school land. The court declared unconstitutional the statute which permitted the use of said money for the con-

struction of buildings for the University of Texas. An examination of that case discloses that the constitutional provision of Texas was practically the same as that of Wyoming, in that it also required that the *proceeds* from the sale of school land should go to the permanent school fund. The court held that such rents and royalties were proceeds from school land and should go to the permanent school fund. From the opinion the following language is taken:

> *"If it should be contended that oil, when severed from the land, becomes personalty, that fact is immaterial and would not change the status of such property. It is provided in our Constitution that the 'proceeds' of the land which is gone shall become part of the permanent fund. In other words, not only the realty, but the resulting personalty, is a part of that fund. Of course, proceeds arising from an alienation or taking of land, or any portion thereof, is usually money or personalty. It was the intention of the framers of our fundamental law that this land, and each portion thereof, should always be in the permanent fund. It was foreseen that it might be best to sell it. In that event it was expressly provided that the substitute for the land should take its place in the permanent fund."*

Said quoted portion of the opinion of the court fully sustains the contention of the defendant, that oil, when severed from the land, becomes personalty, and that such fact was immaterial in both the Texas case and the Wyoming case because of the fact that in each case the constitution required even the proceeds from the land to go

to the permanent school fund, and it is clear that oil and gas royalties are proceeds from the land.

Petitioners also rely upon the case of *Pollock* v. *Farmers Loan & Trust Company,* 157 U. S. 429. In the Pollock case, in an opinion two hundred and twenty-four pages long, the court had before it the validity of an Act of Congress levying an income tax on certain property not according to the rule of apportionment as required by the Constitution. In the opinion, at page 558, the court said:

> "The first question to be considered is whether a tax on the rental or income of real estate is a direct tax within the meaning of the constitution."

The constitutional provision referred to provides that representatives and direct taxes shall be apportioned among the several states according to numbers, and that no direct tax shall be laid except according to the enumeration provided for. On pages 579 to 581 the court said:

> "As no capitation, or other direct tax was to be laid otherwise than in proportion to the population, some other direct tax than a capitation tax (and it might well enough be argued some other tax of the same kind as capitation tax) must be referred to, and it has always been considered that a tax upon real estate *eo nomine* or upon its owners in respect thereof is a direct tax within the meaning of the Constitution. But is there any distinction between the real estate itself or its owners in respect of it and the rents or income of the real estate coming to the owners as the natural and ordinary incident of their own-

ership? * * * The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment—the prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes—and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine*. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on real estate, which would be paid out of the rent or income. This law taxes the income received from land and the growth or produce of the land. Mr. Justice Paterson observed in Hylton's case, 'land independently of its produce, is of no value'; and certainly had no thought that direct taxes were confined to unproductive land."

Therefore, it is evident that the Pollock case decided the question only that a tax on rents and income from land was a direct tax requiring apportionment among the states the same as a tax upon the land itself. In referring to the question as to whether real estate belongs to one of the two great classes of taxes, and rent and income to the other, the court had in mind the two classes of direct and indirect taxation, and held that an income tax on

rent from land not apportioned as required by the Constitution among the states was invalid because it was a direct tax. That this is the proper construction of the holding in the Pollock case is evidenced by the case of *Evans* v. *Gore,* 64 L. ed. 887, 253 U. S. 244, where the question involved was as to whether or not the Federal government could levy an income tax on the salary of a Federal judge, and it was held that the Constitution of the United States prevented the diminishing of the emoluments of a Federal Judge during his term of office. In the opinion the court said:

> "Let us turn, then, to the circumstances in which this amendment was proposed and ratified, and to the controversy it was intended to settle. By the Constitution all direct taxes were required to be apportioned among the several states according to their population, as ascertained by a census or enumeration (Art. 1, Section 2, Cl. 3, and Section 9, Cl. 4), but no such requirement was imposed as to other taxes. And apart from capitation taxes, with which we now are not concerned, no rule was given for determining what taxes were direct and therefore to be apportioned, or what were indirect and not within the requirement. Controversy ensued and ultimately centered around the right classification of income from taxable real estate and from investments in taxable personal property. The matter then came before this court in *Pollock* v. *Farmers Loan & T. Co.,* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; and the decision, when announced, disclosed that the same differences in opinion existing elsewhere were shared by the members of the court—five, the controlling number, regarded a tax on such income as in

effect a direct tax on the property from which it arose, and therefore as requiring apportionment, and four regarding it as indirect and not to be apportioned. Much of the law then under consideration had been framed according to the latter view, and because of this and the adjudged inseparability of other portions the entire law was held invalid. Afterwards, to enable Congress to reach all taxable income more conveniently and effectively than would be possible as to much of it if an apportionment among the states were essential, the Sixteenth Amendment was proposed and ratified. *In other words, the purpose of the Amendment was to eliminate all occasion for such an apportionment because of the source from which the income came—a change in no wise affecting the power to tax, but only the mode of exercising it.*"

Petitioners contend that the gross production tax levied by the State of Oklahoma is a tax upon the royalty interest in the land and is not a tax upon the oil after it is produced. In answering this contention in this case the Supreme Court of Oklahoma in 272 Pac. at page 400 said:

"Thus it appears that the gross production tax is a property tax assessed upon producers of minerals as going concerns and based upon 3 per cent of the gross proceeds after and when the subject of the tax is produced. Likewise everything incident to the lessee's production is taxed on a basis of 3 per cent of the oil and gas produced and everything incident to the lessor's royalty rights in the production is assessed upon a 3 per cent basis of his share of the oil and gas so reduced to possession.

"We find no discrimination between the lessor and the lessee, for each is assessed in the same manner, and there is no denial to the one or to the other of

equal protection of the law and no violation of the Fourteenth Amendment to the Constitution of the United States."

The construction of the meaning of a State statute by the highest court of the State is binding upon the Supreme Court of the United States.

Brown-Formon Co. v. *Kentucky,* 217 U. S. 563.

III.

The exaction of the tax in question does not deny petitioners the equal protection of the law under the Fourteenth Amendment.

In connection with the contention of the petitioners that the exaction of the tax in question from them upon the royalty interest would deny them the equal protection of the law there is cited in the brief certain sections of the Constitution of Oklahoma which petitioners say are violated by the levying of this tax on petitioners' property. These contentions were made in the State court and that court held that none of the provisions of the State Constitution relied upon were violated by the tax, and of course it is not open to petitioners here to insist that provisions of the Oklahoma Constitution have been violated, the construction of the highest court of the State upon its own constitutional provisions being binding upon this Court.

Southwestern Oil Co. v. *Texas,* 217 U. S. 114.

In support of petitioners' contention that they are

denied the equal protection of the law under the Fourteenth Amendment to the Constitution of the United States, petitioners cite *Sioux City Bridge Company* v. *Dakota County,* 260 U. S. 441, 67 L. ed. 340, holding that to tax the property of one company at its full value and all the rest of the property in the county at only fifty-five one-hundredths of its value is a denial of the protection of the law. No other cases in support of petitioners' contention are cited.

We believe it is not apparent from the Oklahoma statutes that there is any discrimination in the valuation of the petitioners' property as compared with other property in the same class and similarly situated.

In *Kentucky Railway Tax Cases,* 115 U. S. 321, 29 L. ed. 414, the rule as to the equal protection required by the Fourteenth Amendment to the Constitution was stated as follows:

> "The rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and the other corporations in the methods and instrumentalities by which the value of their property is ascertained."

In *Delaware R. Co. Tax,* 18 Wall. 206, 231, 21 L. ed. 888, 896, it was said:

> "It is not for us to suggest in any case that a more

equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state. Our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

To the same effect is:

Bell's Gap. R. Co. v. *Pennsylvania,* 134 U. S. 232.
Home Insurance Company v. *New York,* 134 U. S. 594.
Pacific Express Company v. *Seibert,* 142 U. S. 339.
Southwestern Oil Company v. *Texas,* 217 U. S. 114.

As held by the Supreme Court of the State in its decision in this case the statute of Oklahoma requires the payment of a gross production tax based upon 3 per cent of the gross proceeds of oil produced after and when the same is produced and the 3 per cent is used as a basis in arriving at the value of the property so taxed, and this applies not only to lessee's interest but also to the lessor's royalty interest in the production, and we believe the means adopted clearly applies to both lessor and lessee.

This was the holding of the State Supreme Court in prior decisions such as:

In re Gross Production Tax of Wolverine Co., 53 Okla. 24, 154 Pac. 362.
Protest of Bendalari, 82 Okla. 97, 198 Pac. 606.
In re Skelton Lead & Zinc Company's Gross Production Tax, 81 Okla. 134, 197 Pac. 495.

We believe, therefore, that there is no denial of the

equal protection of the laws within the meaning of the Fourteenth Amendment of the Constitution in exacting the tax in question from petitioners.

We therefore respectfully submit that the decision of the Supreme Court of the State of Oklahoma should be in all things affirmed.

Respectfully submitted,

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Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 50.—October Term, 1929.

T. L. Carpenter and Lillie V. Carpenter, Petitioners,
vs.
A. S. J. Shaw, as State Auditor of the State of Oklahoma.
} On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

[January 6, 1930.]

Mr. Justice Stone delivered the opinion of the Court.

This case comes here on writ of certiorari, 279 U. S. 830, to the Supreme Court of Oklahoma to review its judgment upholding a tax imposed under § 9814, Compiled Oklahoma Statutes of 1921, upon "the owner of any royalty interest" in petroleum and natural gas, to the extent of 3% of the gross value of the royalty.

The petitioners are enrolled Choctaw Indians of less than half blood who, by virtue of their membership in the tribe, have received allotments of lands within the State of Oklahoma, under the Atoka Agreement with the Choctaw and Chickasaw Tribes, embodied in § 29 of the Act of June 28, 1898, ratified August 24, 1898, 30 Stat. 495. By this section it is provided that "all the lands allotted shall be non-taxable while the title remains in the original allottees but not to exceed twenty-one years from the date of patent . . . ," which period had not expired with respect to the lands of petitioners at any of the times material to the present case. All restrictions on alienation affecting the allotments of these petitioners were removed by Act of Congress of May 27, 1908, 35 Stat. 312.

The petitioners, who have leased their allotments for the production of oil and gas, reserving a royalty of one-eighth of the value of the gross production, have paid the tax assessed for 1926 and 1927 under protest, and brought the present suit to recover it as exacted contrary to the exemption. The state court denied recovery on the ground that the tax is imposed only on the oil and gas when

severed from the land and so is a tax upon personalty not embraced within the exemption. 134 Okla. 35.

In *Choate* v. *Trapp*, 224 U. S. 665, the history of the Atoka Agreement was reviewed by this Court. It was there held that the provision for the exemption conferred, upon the allottees, property rights which were within the protection of the Fifth Amendment and hence it was not subject to repeal by later Congressional legislation; that the restriction, being one imposed in the exercise of the plenary power of Congress over the Indian tribes and tribal lands and in the performance of its duty as the guardian of its Indian wards, see *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565, and having been accepted by the State of Oklahoma in its constitution upon admission to statehood, was a limitation upon the taxing power of the state. See also *Ward* v. *Love County*, 253 U. S. 17.

Until the removal by the Act of May 27, 1908, of existing restrictions on alienation of the allotted lands, state taxation even more remotely affecting the interests of allottees than the present tax, would concededly have been forbidden as a tax upon an instrumentality of the national government. See *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292; *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609; *Gillespie* v. *Oklahoma*, 257 U. S. 501; *Howard* v. *Gypsy Oil Company*, 247 U. S. 503; *Large Oil Company* v. *Kansas*, 248 U. S. 549. But it is urged that as the restrictions have now been removed, Congress, by its attempted repeal of the exemption and by later legislation of May 10, 1928, 45 Stat. 496, subjecting oil and gas, produced from restricted allotted lands of members of the five civilized tribes, to state and federal taxes, has evidenced an intention to subject the Indians to all taxes imposed upon citizens of Oklahoma. From this it is concluded that the exemption in § 29 must be narrowly construed to effect the Congressional purpose. See *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575.

While in general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed, *Heiner* v. *Colonial Tr. Co.*, 275 U. S. 232, the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government. *Choate* v. *Trapp, supra*, 675. Such provisions are to be liberally construed. Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice

Marshall, "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." *Worcester* v. *The State of Georgia,* 6 Pet. 515, 582. See *The Kansas Indians,* 5 Wall. 737, 760. And they must be construed not according to their technical meaning but "in the sense in which they would naturally be understood by the Indians." *Jones* v. *Mehan,* 175 U. S. 1, 11.

Whatever was the meaning of the present exemption clause at the time of its adoption must be taken to be its effect now, since it may not be narrowed by any subsequently declared intention of Congress. *Choate* v. *Trapp, supra.* Having in mind the obvious purpose of the Atoka Agreement to protect the Indians from the burden of taxation with respect to their allotments and this applicable principle of construction, we think the provision that "the lands allotted shall be non-taxable while the title remains in the allottees" cannot be taken to be restricted only to those taxes commonly known as land or real estate taxes, but must be deemed at least to embrace a tax assessed against the allottees with respect to a legal interest in their allotment less than the whole, acquired or retained by them by virtue of their ownership.

Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted. *Choctaw Gulf R. R.* v. *Harrison, supra; Galveston, Harrisburg & San Antonio Ry.* v. *Texas,* 210 U. S. 217, 227. We think it plain that the tax imposed on the royalty interest of the present petitioners is not a tax on oil and gas severed from the realty, but is, by its very terms, a tax upon the right reserved in them as lessors and owners of the fee. The tax is imposed on the "royalty interest . . . except such interests of the State of Oklahoma or such royalty interests as are exempted from taxation under the laws of the United States" and is made "a lien on such interest." It is in lieu of all other taxes "upon any property rights attached to or inherent in the right" to the specified minerals and "upon the mining rights and privileges for the minerals aforesaid belonging to or appertaining to the land."

It sufficiently appears, were that controlling, that numerous decisions of the Oklahoma courts since the Atoka agreement have treated the royalty interest of the lessor as a right attached and incident to his ownership or reversionary interest in the land. *Barnes* v. *Keyes*, 36 Okla. 6; *Strawn* v. *Brady*, 84 Okla. 66; *Harris* v. *Brady*, 136 Okla. 275; compare *Rich* v. *Doneghey*, 71 Okla. 204, and see *Parker* v. *Riley*, 250 U. S. 66. But even if this did not appear to be the case, an interest commonly so regarded and practically so associated with the use and enjoyment of the allotted lands could not, under the rule of liberal construction rightly invoked by the petitioners, be deemed excluded from the benefits of the exemption granted by § 29. See *Lake Superior Mines* v. *Lord*, 271 U. S. 577, 582; *Waggoner Estate* v. *Wichita County*, 273 U. S. 113; *Butt* v. *Ellett*, 19 Wall. 544; *State* v. *Snyder*, 29 Wyo. 163; *Hearne* v. *Lewis*, 78 Texas 276; *Condit* v. *Neighbor*, 13 N. J. Law 83; *York* v. *Jones*, 2 N. H. 454; *Burden* v. *Thayer*, 3 Metc. (Mass.) 76, 78; *Nelson* v. *Joshel*, 305 Ill. 420, 428; *Frerich* v. *Abrams*, 97 Wash. 460, 462; *Macdonough* v. *Starbird*, 105 Calif. 15, 19. Compare *Pollock* v. *Farmers Loan & Tr. Co.*, 157 U. S. 429.

The Supreme Court of Oklahoma also rested its denial to petitioners of the right to recover the 1926 tax upon the ground that, having failed to pay the tax for the year when due, they were barred by the provisions of §§ 9971 and 9973 of the Compiled Oklahoma Statutes for 1921. Under these sections, relief by injunction against the collection of any tax is forbidden and a suit to recover a tax alleged to be illegally assessed is allowed only if paid "at the time and in the manner provided by law." But the petitioners' allegations, admitted on demurrer, are that the tax was paid under duress and compulsion to prevent the issue of respondent's warrant for its collection, to prevent the stopping by respondent of further royalty payments to them, and to prevent the accumulation of statutory penalties. These allegations are sufficient to bring the case within the ruling of this Court in *Ward* v. *Love County*, *supra*, that a denial by a state court of a recovery of taxes exacted in violation of the laws or constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment. The judgment below will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.